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# In the Supreme Court of the United States

October Term, 1942.

JANE M. STIMSON and BLANCHE M NEWMAN,
Petitioners,

vs.

R. C. TARRANT and BARNES, BUTLER OIL COMPANY, a corporation,
Respondents.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

and

## BRIEF IN SUPPORT THEREOF.


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....., Clerk.

# Subject Index


| | Pages |
|---|---|
| PETITION FOR WRIT OF CERTIORARI | 1-11 |
| Summary Statement of the Matter Involved | 1-5 |
| Question Presented | 5-8 |
| Jurisdiction | 8 |
| Reasons Relied on for Allowance of the Writ | 8-10 |
| Prayer | 10 |
| Certificate of Counsel | 11 |
| BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI | 13-36 |
| I. Opinions of the Courts below | 13 |
| II. Jurisdiction | 14 |
| III. Statement of the Case | 14 |
| IV. Specifications of Error | 14-16 |
| V. Argument | 16-36 |
| Summary of the Argument | 16 |
| A. The Circuit Court of Appeals failed to apply the law of Montana as declared in *Berthelote, et al v. Loy Oil Co., et al.*, 95 Mont. 434 | 16-18 |
| B. In the case of *Severson v. Barstow*, 103 Mont. 526, the Supreme Court of Montana reaffirmed the law as declared in the *Berthelote* case and distinguished between the law applicable to gas and the law applicable to oil | 18-23 |
| C. The Statement of the Supreme Court of Montana in the case of *Severson v. Barstow*, 103 Mont. 526, that "a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided," is a Statement of the Law of Montana and not "dictum", as stated by the Circuit Court of Appeals | 23-26 |

Pages

D. The Circuit Court of Appeals failed to follow the Law of Montana relating to the construction of contracts, and oil and gas leases in particular ..... 26-29

E. Under the Law of Montana, matters of affirmative defense, such as excuses for non-production, may not be availed of in an action of this kind ..... 29-31

F. The Circuit Court of Appeals decided this case upon the basis of what it thinks the Supreme Court of Montana might do in a similar case, instead of according to the existing law of Montana ..... 31-32

G. That the decision of the Circuit Court of Appeals is also in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Continental Oil Co. v. Osage Oil & Refining Co.*, 69 Fed. (2d) 19, which decision Petitioners contend is in accord with the decisions of the Supreme Court of Montana..... 33-34

H. The Importance of the Questions Involved..... 34-36

# Table of Authorities Cited


Pages

*Anderson v. Mace,* 99 Mont. 421, 45 Pac. (2d) 771 ..... 21

*Berthelote v. Loy Oil Co.,* 95 Mont. 434, 28 Pac. (2d) 187 ..... 6, 9, 14, 16, 18

*Cities Service Oil Company v. Dunlop,* 308 U. S. 208..... 8, 9

*Continental Oil Co. v. Osage Oil & Refining Co.,* (10th Cir.) 69 Fed. (2d) 19 ..... 5, 9, 16, 33

*Elliott v. Crystal Springs Oil Co.,* 106 Kan. 248, 187 Pac. 692.. 22

*Erie R. Co. v. Tompkins,* 304 U. S. 64..... 8, 9, 26, 32, 33

*Florida Central R. R. Co. v. Schutte,* 103 U. S. 118 ..... 25

*Gilna v. Barker,* 78 Mont. 357, 254 Pac. 174 ..... 21

*Hawks v. Hamill,* 288 U. S. 52 ..... 26

*Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U. S. 487..... 8, 9, 32

*McDaniel v. Hager-Stevenson Oil Co.,* 75 Mont. 356, 243 Pac. 582 ..... 7, 9, 15, 27, 28, 29, 32

*McNamer Realty Co. v. Sunburst Oil & Gas Co.,* 76 Mont. 332, 247 Pac. 166 ..... 9, 29, 30

*Montana Horse Products Co. v. Great Northern Ry. Co.,* 91 Mont. 194, 7 Pac. (2d) 919 ..... 25

*Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202 ..... 27, 33

*Severson v. Barstow,* 103 Mont. 526, 63 Pac. (2d) 1022..... 4, 5, 6, 9, 15, 16, 18, 20, 22, 23, 25, 31, 32

*Sinnott, et al v. Schumacher, et al.,* 45 Cal. App. 46, 187 Pac. 105 ..... 24

*Six Companies of California v. Joint Highway District No. 13,* 311 U. S. 180 ..... 8, 9, 24

*Smith v. United States,* (10th Cir.) 113 Fed. (2d) 191 ..... 34

*Stanolind Oil & Gas Co. v. Guertzgen,* 100 Fed. (2d) 299 ..... 28

*Stimson, et al v. Tarrant, et al* (instant case), 43 Fed. Supp. 657 & 132 Fed. (2d) 363 ..... 13

Pages

*Story Gold Dredging Co. v. Wilson*, 99 Mont. 347, 42 Pac. (2d) 1003 ..... 7, 9, 27

*Thomas v. Standard Development Co.*, 70 Mont. 156, 224 Pac. 870 ..... 31

*Union P. R. Co. v. Mason City & Ft. D. R. Co.*, 199 U. S. 160 ..... 25

*Van Dyke v. Parker*, (9th Cir.) 83 Fed. (2d) 35 ..... 25

*Watson v. Rochmill*, 137 Tex. 565, 155 S. W. (2d) 783 ..... 22

*West v. American Tel. & Tel. Co.*, 311 U. S. 223 ..... 26

*Yoder, et al v. Nu-Enamel Corporation*, 117 Fed. (2d) 488 ..... 26

## Codes and Statutes

Page

Judicial Code, Sec. 240, as amended (U. S. C. A., Title 28, Sec. 347) ..... 8

Section 7529, Revised Codes of Montana, 1935 ..... 27

United States Supreme Court Rule 38, Par. 5 (b) ..... 8

## Miscellaneous

Pages

*Mills & Willingham on Oil and Gas.* p. 121 ..... 19, 20, 22

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No.....

JANE M. STIMSON and BLANCHE M NEWMAN,
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vs.

R. C. TARRANT and BARNES, BUTLER OIL COMPANY, a corporation,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT**

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioners, Jane M. Stimson and Blanche M. Newman, plaintiffs and appellants below, respectfullyshow:

**SUMMARY STATEMENT OF THE MATTER INVOLVED.**

This is an action to have an oil and gas lease declared terminated by reason of the cessation of the production of oil, pursuant to the "thereafter" clause contained therein, and to have the cloud on the title created thereby removed. (Complt., R. 3-5 & Opin. of Dist. Ct., R. 61). The "thereafter" clause reads:

(Note): References to the record are designated "R", and all emphasis by underscoring are by the authors of this Petition and Brief.

> "It is agreed that this lease shall remain in force for a term of five years from this date and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee." (R. 6)

No question of "forfeiture" is involved because this lease did or did not terminate "automatically", pursuant to the foregoing "thereafter", clause upon cessation of production.

Production of gas is not involved. (R. 107, 109, 113, 181)

The undisputed facts material to consideration of this petition are as follows:

In December, 1930, petitioners' mother (since deceased) and respondent Barnes, Butler Oil Company entered into an oil and gas lease covering 320 acres of land, now owned by petitioners, in the Cut Bank oil field in Glacier County, Montana. This lease was on a form known as "Producers 88 Montana" (R. 6 & 434) and was, as recited therein,

> "for the sole and only purpose of mining and operating for oil, and gas and of laying pipe lines and of building tanks, power stations and structures thereon to produce, save and take care of said products", (R. 6)

The lease also provided that the lessee should,

> "deliver to the credit of lessor free of cost, in the pipe line to which lessee may connect his wells, the equal one-eighth (1/8) part of all oil and gas produced and saved." (R. 7)

Prior to January, 1938, respondent Tarrant was producing oil from three wells in the northeast corner of Petitioners' land (R. 119-122) and had

sold as royalties from those wells more than fifty of the eighty percent of the oil to which he was entitled under his sub-lease. (R. 190 & 363).

In 1932 respondent Barnes, Butler Oil Company sub-let the land to respondent Tarrant, reserving to itself 7½% of the oil and gas (R. 12).

The complaint alleges (R. 3) and the amended answer (R. 25 & 26) admits that production of oil from petitioner's land began in May, 1933, entirely ceased in January 1938, and that no oil was thereafter produced from that land for approximately fourteen (14) months.

Respondents made no claim that oil could not have been produced from the land involved during the fourteen (14) months of non-production.

Respondents, however, as reasons why they should be relieved from the effect of the admitted non-production of oil alleged, in paragraph XII of their amended answer, (R. 27) and claimed throughout the trial, among other things, that there was no market for oil and that there were no storage facilities available in the field for oil which could have been produced from petitioner's land, and that respondent Tarrant tried to find a market and storage for the oil.

Throughout the trial, petitioners objected to evidence in support of these matters of affirmative defense, on the ground that none of the matters alleged constituted a defense in an action of this kind. This question was presented to the Circuit Court of Appeals by point No. "II" of petitioner's

"Statement of Points on Appeal" (R. 80).

The action was tried before the United States District Court for the District of Montana on December 19, 1940 (R. 90), which court decided that this lease did not terminate pursuant to the "thereafter" clause upon cessation of production. (Findings and Conclusions R. 59). Judgment was rendered for respondents on October 15, 1941 (R. 69).

Petitioners appealed the judgment of the District Court to the United States Circuit Court of Appeals for the Ninth Circuit (R. 77) which court on December 15, 1942 affirmed the judgment, (R. 473). On February 4, 1943 petitioners filed petition for re-hearing which was denied on February 15, 1943 (R. 481).

The Circuit Court of Appeals, in its decision, declared:

> "The problem presented is whether the lease automatically terminated upon the temporary cessation of production of oil for lack of market, pursuant to a clause providing that the lease is to continue for a period of five years and 'as long thereafter as oil or gas, or either of them, is produced.' " (R. 474)

and that:

> "The question is one of Montana law." (R. 475)

Those statements are correct but the Court then proceeded to apply an erroneous interpretation of the decision of the Supreme Court of Montana in *Severson v. Barstow,* 103 Mont. 526, 63 Pac. (2d) 1022, which is the latest decision of that court involving the question presented by this petition.

As pointed out by the Circuit Court of Appeals, the Montana Court in the *Severson* case had "resort to a legal fiction", (R. 478), that, "in the absence of a market", gas is considered produced, when in fact it is not produced.

Having applied that "fiction" to gas, the Montana Court decided that if, in such a situation, the lessee sustained the burden of proving that he had used reasonable diligence to find a market, the lease would not be declared terminated; but further decided that such a fiction would not be applied in a case involving production of oil only. It said:

> "A different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided." (103 Mont. @ 532)

Treating that declaration of the Montana court as "dictum", the Circuit Court of Appeals declined to follow it and applied the rule in this case which the Montana Court specifically said is limited to gas and expressly declared is inapplicable to a case involving, as this case does, only oil.

## QUESTIONS PRESENTED.

Two questions of law are presented: First, whether the decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with the law of Montana as declared by the Supreme Court of Montana, and, second, whether the decision is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Continental Oil Co. et al v. Osage Oil & Refining Co.*, 69 Fed. (2d) 19,

which decision petitioners contend is in accord with the law of Montana.

The first question involves the following inquiries:

1. Is the decision of the Circuit Court of Appeals that the lease did not terminate pursuant to the "thereafter" clause upon cessation of production, in conflict with the decisions of the Supreme Court of Montana in *Berthelote v. Loy Oil Co.*, 95 Mont. 434, 28 Pac. (2d) 187 and *Severson v. Barstow*, 103 Mont. 526, 63 Pac (2d) 1022?

2. Is the italicized portion of the following quotation from the decision in *Severson v. Barstow*, supra, "dictum" as declared by the Circuit Court of Appeals in this case?

> "The court correctly concluded that, 'in the entire absence of a market, the lands * * * * have been since the 11th day of May, in legal contemplation, producing gas in commercial quantities; that said lease is still in force and effect.'
>
> Where, as here, the principal consideration for a lease is the payment of royalty, the lease carries an implied covenant to use reasonable diligence to market the product when produced, although the lease is silent on the subject, and whatever is implied in a contract is as effectual as what is expressed; in an action to cancel such a lease, the burden rests upon the lessee to establish the fact of reasonable diligence if he would prevent cancellation. *Berthelote v. Loy Oil Co.*, 95 Mont. 434, 28 P. (2d) 187. The lessees here met this requirement, and, while a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided, in legal contemplation, under the facts shown, this

gas well was 'producing' within the meaning of the lease. *Mills & Willingham on Oil and Gas,* 121; *Berthelote v. Loy Oil Co.,* supra; *Pelham Petroleum Co. v. North,* 78 Ok. 39, 186 P. 1069."

3. Is the decision in conflict with decisions of the Supreme Court of Montana deciding that:

(a) A contract may not be changed under the guise of interpretation; where a contract is plain and clear in its terms, neither interpretation nor construction is permissable. (*McDaniel v. Hager-Stevenson Oil Co.,* 75 Mont. 356, 243 Pac. 582);

(b) Courts must enforce contracts as made, not make new ones for the parties no matter how unreasonable the terms may appear. (*Story Gold Dredging Co. v. Wilson,* 99 Mont. 347, 42 Pac. (2d) 1003);

(c) When a contract is optional in respect to one party, it is to be construed strictly in favor of the party that is bound and against the one who is not bound, and oil and gas leases are to be construed liberally in favor of the lessor and strictly against the lessee. (*McDaniel v. Hager-Stevenson Oil Co.,* supra).

4. Has the legal fiction that oil, as distinguished from gas, is produced when in fact it is not produced (indulged in by the Circuit Court in this case), ever been resorted to in Montana?

5. Is the decision insofar as it sustains the admission of, and is based upon evidence in support of the matters of affirmative defense, including alleged lack of market, as set forth in paragraph

XII of the amended answer, in conflict with the law of Montana as declared by the decisions of the Supreme Court of that State?

**JURISDICTION.**

Petitioners, appellants in the Circuit Court of Appeals, invoke the jurisdiction of this Court under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, Section 347, U. S. C. A.) and the decision of this Court in the case of *Erie R. Co. v. Tompkins,* 304 U. S. 64. Petitioners also rely on paragraph 5 (b) of Rule 38 of this Court.

Petitions for writs of certiorari to review decisions of the United States Circuit Court of Appeals, which have failed to follow the laws of the several states, have been heretofore granted by this Court in many cases, including *Six Companies of California v. Joint Highway District No. 13,* 311 U. S. 180, *Cities Service Oil Company v. Dunlop,* 308 U. S. 208, and *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U. S. 487.

**REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.**

**A.**

The decision of the Circuit Court of Appeals (involving an important question of Montana law), that the lease did not automatically terminate, pursuant to the "thereafter" clause, upon cessation of

production is in conflict with decisions of the Supreme Court of that state in the following cases:

*Berthelote, et al v. Loy Oil Co., et al.*, 95 Mont. 434, 28 Pac. (2d) 187;
*Severson, et al v. Barstow, et al.*, 103 Mont. 526, 63 Pac. (2d) 1022;
*McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582;
*McNamer Realty Co. v. Sunburst Oil & Gas Co.*, 76 Mont. 332, 247 Pac. 166;
*Story Gold Dredging Co. v. Wilson*, 99 Mont. 347, 42 Pac. (2d) 1003.

**B.**

That the Circuit Court of Appeals, in refusing to be bound by or to follow decisions of the Supreme Court of Montana, failed to follow the decisions of the United States Supreme Court in the following cases:

*Erie R. Co. v. Tompkins*, 304 U. S. 64;
*Cities Service Co. v. Dunlop*, 308 U. S. 208;
*Six Companies of California v. Joint Highway Dist. No. 13*, 311 U. S. 180;
*Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U. S. 487.

**C.**

That the decision of the Circuit Court of Appeals is also in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Continental Oil Co. v. Osage Oil & Refining Co.*, 69 Fed. (2d) 19, which decision petitioners contend is

in accord with the decisions of the Supreme Court of Montana.

D.

In view of the fact that production of oil is one of Montana's principal industries and the further fact, which is a matter of common knowledge, that practically every oil lease has a "thereafter" clause identical with, or substantially the same as the one in this case, the question involved is of the utmost importance.

---

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals the case numbered and entitled on its docket, No. 10067, Jane M. Stimson and Blanche M. Newman, Appellants, vs. R. C. Tarrant and Barnes, Butler Oil Company, a corporation, Appellees, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment of said Circuit Court of Appeals

be reversed by this Court, and for such other and further relief as may be proper.

Dated, Helena, Montana, March 31, 1943.

M. S. GUNN,
*of Helena, Montana,*
WILLIAM H. HUNT,
BRADFORD M. MELVIN,
HAROLD C. FAULKNER,
*of San Francisco, California,*
*Attorneys for Petitioners.*

GREGORY, HUNT, MELVIN & FAULKNER,
*of San Francisco, California,*
GUNN, RASCH & GUNN,
*of Helena, Montana.*
*Of Counsel for Petitioners.*

**CERTIFICATE OF COUNSEL.**

I hereby certify that I am one of the petitioners' attorneys in the above entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, Helena, Montana, March 31, 1943.

M. S. GUNN,
*Attorney for Petitioners Jane M. Stimson and Blanche M. Newman.*

# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

# In the Supreme Court of the United States

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No.....

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Respondents.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.**

## I.

### OPINIONS OF THE COURTS BELOW.

The opinion of the District Court, rendered October 14, 1941, is set forth in full in the record, (R. 61-68) and is reported under the title Stimson, et al v. Tarrant, et al, 43 Fed. Supp. 657. The opinion of the Circuit Court of Appeals was rendered December 15, 1942, is set forth in full in the record, (R. 474) and is reported under the same title in 132 Fed. (2d) 363.

## II.

### JURISDICTION.

Petitioners adopt the reasons stated in the petition for writ of certiorari (p. 8 hereof) as supporting the jurisdiction of this Court.

## III.

### STATEMENT OF THE CASE.

Petitioners adopt the "SUMMARY STATEMENT OF THE MATTER INVOLVED", appearing in the petition for writ of certiorari (pp. 1-5 hereof) as a statement of the case, for the purpose of this brief.

## IV.

### SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in holding (R. 475) that there is no reported case from Montana determining the meaning of a "thereafter" clause in an oil and gas lease reading:

> "It is agreed that this lease shall remain in force for a term of five years from this date and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee." (R.6)

2. The Circuit Court of Appeals erred in refusing to follow the interpretation of a "thereafter" clause identical with the one in our case by the Supreme Court of Montana in *Berthelote v. Loy Oil Co.*, 95 Mont. 434, 28 Pac. (2d) 187, and in assuming and

holding that the language of the Montana court in that case, to the effect that:

> "under the lease, the oil or gas must not only be discovered but must be produced and the production continue thereafter during the entire term," (95 Mont. @ 448)

is not clearly related to the Court's discussion of the "thereafter" clause. (R. 477)

3. The Circuit Court of Appeals erred in applying the fiction resorted to in the *Severson* case, 103 Mont. 526, 63 Pac. (2d) 1022, (which involved gas only) that:

> " 'in the entire absence of a market, the lands * * * have been * * *, in legal contemplation producing gas in commercial quantities; that said lease is still in force and effect,' " (103 Mont. @ 532)

to this case, in which the production of oil only is involved, and in treating as "dictum" the declaration of the Montana court in the *Severson* case that:

> "a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided," (103 Mont. @ 532)

4. The Circuit Court of Appeals erred in failing to apply the law of Montana as to the construction of contracts, as declared by the Supreme Court of Montana in *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582, and other cases herein referred to.

5. The Circuit Court of Appeals erred in deciding this case on the assumption that the Montana court would, if a case involving oil only were presented to it, apply the same fiction which it had ap-

plied in the *Severson* case where gas only was involved. (R. 478)

6. The Circuit Court of Appeals erred in sustaining the admission of, and basing its decision upon, evidence in support of the matters of affirmative defense, including alleged lack of market and storage facilities, set forth in paragraph XII of the amended answer.

7. The Circuit Court of Appeals erred in failing to follow the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Continental Oil Co. v. Osage Oil & Refining Co.*, 69 Fed. (2d) 19, which decision petitioners contend is in accord with the decisions of the Supreme Court of Montana.

## V.

## ARGUMENT.

### SUMMARY

Argument herein will consist of discussion of the "inquiries" referred to under the title "QUESTIONS PRESENTED" in the petition (pp. 5-8 hereof) and will follow in chronological order the foregoing SPECIFICATIONS OF ERROR".

### A.

### THE CIRCUIT COURT OF APPEALS FAILED TO APPLY THE LAW OF MONTANA AS DECLARED IN BERTHELOTE, ET AL v. LOY OIL CO., ET AL., 95 MONT. 434.

The *Berthelote* case involved an oil and gas lease

containing a "thereafter" clause identical with the one in our case. In the opinion in that case the court said:

> "'Defendants offered an instruction to the effect that if the lessee had on or prior to February 26, 1931 drilled a well producing oil or gas, then the terms of the lease were satisfied. The offer was denied and this denial is assigned as error." (95 Mont. @ 447)

and in disposing of this specified error said:

> "The instruction was offered on the theory that under a lease as this one, the production of oil or gas in any quantity is sufficient to continue it in existence beyond the fixed term. * * *
>
> Some courts have held that under a similar 'thereafter' clause, any production which is capable of being divided is a sufficient compliance to continue the life of the lease, as in *Gillespie v. Ohio Oil Co.*, 260 Ill. 169, 102 N. E. 1043, and *McGraw Oil & Gas Co., v. Kennedy*, 65 W. Va. 595, 64 S. E. 1027, 28 L. R. A. (n. s.) 959. Suffice it to say that we are not impressed with the reasoning in the cases so holding, and decline to follow them.
>
> * * * * * * *
>
> The offered instruction was otherwise objectionable in that the mere discovery of oil under it validated the lease, whereas under the lease, the oil or gas must not only be discovered but must be produced, and the production continue thereafter during the entire term." (99 Mont. @ 448)

This is an unqualified declaration by the Supreme Court of Montana as to the meaning and effect of a "thereafter" clause such as we have in this case.

Referring to that language, the Circuit Court of Appeals, in its opinion, said:

> "A difficulty with the opinion as authority here is that the court does not clearly relate its discussion to the 'thereafter' clause." (R. 477)

We respectfully submit that, in making that statement, the Circuit Court of Appeals was mistaken and that the language of the Montana Court, quoted above, conclusively establishes that its declaration that production must continue during the entire term of the lease is clearly related to its discussion of the "thereafter" clause. This being true, it is self evident that the decision of the Circuit Court of Appeals that the lease did not terminate upon cessation of production is in conflict with the law of Montana.

**B.**

**IN THE CASE OF SEVERSON v. BARSTOW, 103 MONT. 526, THE SUPREME COURT OF MONTANA REAFFIRMED THE LAW AS DECLARED IN THE BERTHELOTE CASE AND DISTINGUISHED BETWEEN THE LAW APPLICABLE TO GAS AND THE LAW APPLICABLE TO OIL.**

In the *Severson* case, the Supreme Court decided that a lease involving production of gas only did not, "in the entire absence of a market," terminate upon cessation of production. To accomplish this result, the Montana Court had to, as said by the Circuit Court of Appeals in its opinion:

> "resort to a legal fiction in order to avoid cancellation." (R. 478).

The fact that the Montana Court had to resort to this fiction to avoid declaring the lease terminated

is an unqualified recognition of the meaning and effect of a "thereafter" clause, as declared in the Berthelote case.

In the *Severson* case the Montana Court said:

> "The court correctly concluded that, 'in the entire absence of a market, the lands * * * have been since the 11th day of May, in legal contemplation, producing gas in commercial quantities; that said lease is still in force and effect.'
>
> Where, as here, the principal consideration for a lease is the payment of royalty, the lease carries an implied covenant to use reasonable diligence to market the product when produced, although the lease is silent on the subject, and whatever is implied in a contract is as effectual as what is expressed; in an action to cancel such a lease, the burden rests upon the lessee to establish the fact of reasonable diligence if he would prevent cancellation. *Berthelote v. Loy Oil Co.*, 95 Mont. 434, 28 P. (2d) 187. The lessees here met this requirement, and, while a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided, in legal contemplation, under the facts shown, this gas well was 'producing' within the meaning of the lease. *Mills & Willingham on Oil and Gas*, 121; *Berthelote v. Loy Oil Co.*, supra; *Pelham Petroleum Co. v. North*, 78 Okl. 39, 188 P. 1069." (103 Mont. @ 532.)

The underscored language is a definite declaration that the "fiction" resorted to and the rule applied as to gas is not applicable to oil. It will be noted that the Montana court cites *Mills & Willingham on Oil and Gas*, 121, in support of that declaration. Those authors state the rule as follows:

> "If the lessee should discover oil in an

> amount sufficient to extend the fixed term, it would be his duty, under the implied covenant for diligent operation, to produce from the well and allow to the lessor his part as royalty. This, for the reason that oil, unlike gas, may be stored in the event there is no immediate market for it.
>
> In the case of the discovery of gas, however, a different proposition is presented for the reason that gas cannot be marketed without a pipe line, which can sometimes be provided only at ruinous expense. Where a well, capable of producing gas, is drilled but the product is not marketed for the lack of facilities, the rule would seem to be that gas is being produced within the meaning of the parties."

In support of that statement *Mills & Willingham* (note at p. 121) cite decisions from West Virginia, Oklahoma, Pennsylvania, Texas, Wyoming and the Federal Circuit Court of Appeals.

The Circuit Court of Appeals has in this case, involving oil only, applied a rule which the Supreme Court of Montana in the *Severson* case, and the courts in practically every oil producing State, say is specifically limited to gas and expressly declare is inapplicable to any case involving oil.

That the "legal fiction" and the rule applied in the *Severson* case cannot be applied in this case, or any case involving only the production of oil, is convincingly demonstrated by the fact that it has never been so applied by the Supreme Court of Montana and so far as the authors of this brief are able to determine, by any court in the United States.

It is also worthy of note that even though the Montana Court in the *Severson* case resorted to a

"legal fiction" to avoid declaring the entire lease terminated, it did declare the lease terminated as to all of the land except that upon which the producing wells were located. (103 Mont., @ 534).

The reason for the difference between the rule as to gas and as to oil is clearly illustrated by an allegation in the amended answer in this case. Although respondents allege that they could not sell nor store the oil which could have been produced from petitioners' land, they allege that, after respondent Tarrant had filled the storage tanks upon the premises (capacity 900 barrels),

> "no facilities were available to him except by continuing the pumping of said wells to capacity and running the oil to some storage company which would exact payment of storage fees, to-wit, from January 1938 and for a long time thereafter, at the rate of approximately one and one-half cents per month per barrel of the oil so stored," (R. 31)

The Supreme Court of Montana in *Anderson v. Mace,* 99 Mont. 421, 45 Pac. (2d) 771, said:

> "It is the general rule that allegations, statements or admissions contained in a pleading are conclusive as against the pleader," (99 Mont. @ 427)

And, in *Gilna v. Barker,* 78 Mont. 357, 254 Pac. 174, the court said:

> "A party is bound by his pleading. He may not plead one thing and contend to the contrary." (78 Mont. @ 368)

As to storage, the Circuit Court of Appeals said,

> "And the storage of the oil underground was as effective as is storage in surface tanks and obviously more economical." (R. 479)

No question as to which method is the more effective is involved in this case. Under the lease respondents were required to produce oil and deliver 1/8th of the oil so produced to "credit of the lessor free of cost, in the pipe line". (R. 7) This they failed to do.

Referring to the rule declared in *Elliott v. Crystal Springs Oil Co.*, 106 Kan. 248, 187 Pac. 692, which is discussed by the Supreme Court of Montana in the *Severson* case, (103 Mont. @ 532) the Circuit Court of Appeals said:

> "The Montana Court declined to adopt so literal an interpretation of the contract." (R. 478).

In the note to that statement the Circuit Court of Appeals said that the rule which the Montana Court declined to adopt is in accord with the rule applied in Texas. To the contrary, the Supreme Court of Montana in the *Severson* case (103 Mont. @ 533) said that the rule in the Kansas case (*Elliott v. Crystal Springs Oil Co.*) is "not in accord with the authorities generally" and in support of that statement cites *Mills & Willingham*, 121, (hereinbefore referred to at p. 20) and authorities from seven states, including Texas.

The fact of the matter is that Montana has consistently followed the decisions of the Texas courts. The case of *Watson v. Rochmill*, 137 Tex. 565, 155 S. W. (2d) 783, (1941) referred to by the Circuit Court of Appeals in the note to its opinion, (R. 478) involved a "thereafter" clause identical with ours except that the primary term was three instead of

five years. In that case the Supreme Court of Texas clearly and concisely states the reasons for the rule that an oil lease terminates automatically upon cessation of production, as follows:

> "There was no production for a period of two years and seven months. The cessation of production for this long period of time was not brought about nor induced by any mechanical breakdown or other condition in connection with the well or the equipment used in connection therewith. The demoralized condition of the oil market and the low gravity of the oil in no wise prevented the operation of the well by the lessee for whatever oil it would produce. These conditions may have rendered it unprofitable to operate the well, but were not contracted against and consequently they did not prevent a lapsation of the lease when production ceased. *Stanolind Oil & Gas Co. v. Barnhill*, Tex. Civ. App. 107 S. W. 2d 746;" (155 S. W. (2d) @ 784)

C.

**THE STATEMENT OF THE SUPREME COURT OF MONTANA IN THE CASE OF SEVERSON v. BARSTOW, 103 MONT. 526, THAT "A DIFFERENT RULE PREVAILS WITH RELATION TO OIL WELLS, AS OIL, UNLIKE GAS, MAY BE STORED AND DIVIDED," IS A STATEMENT OF THE LAW OF MONTANA AND NOT "DICTUM" AS STATED BY THE CIRCUIT COURT OF APPEALS.**

In its opinion (R. 478 & 479) the Circuit Court of Appeals said that the statement of the Montana Court in the *Severson* case that:

> "a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided," (103 Mont. @ p. 532)

is "dictum".

This Court, in the case of *Six Companies of California v. Joint Highway District No. 13,* 311 U. S. 180, reversed a decision of the Ninth Circuit Court of Appeals, reported in 110 Fed. (2d) 620. In the decision which was reversed the Circuit Court of Appeals had decided that a provision in a construction contract for liquidated damages for failure to complete the contract within a certain time applied although there was an abandonment of the contract by the contractor. This was contrary to a decision of the District Court of Appeals of California in the case of *Sinnott, et al v. Schumacher, et al.,* 45 Cal. App. 46, 187 Pac. 105, and this Court, in reversing the Circuit Court of Appeals, said:

> "Respondent urges that what was said by the District Court of Appeal in the Sinnott Case with respect to the liquidated damage clause was a mere dictum. We do not so regard it. This part of the opinion of the court was its answer to the appellants' insistence that the judgment on appeal was erroneous because the liquidated damage clause had been disregarded and damages had been awarded in excess of the amount for which the contract provided. What the court said as to this was a statement of the ground of its decision. It was a statement of the law of California as applied to the facts before the court." (311 U. S. @ 187)

What was said in the *Severson* case with reference to the "thereafter" clause was in answer to the contention that the clause applied without qualification. The statement that "a different rule prevails with relation to oil wells, as oil, unlike gas, may be

stored and divided," was the very ground of the decision.

In the case of *Montana Horse Products Co. v. Great Northern Ry. Co.*, 91 Mont. 194, 7 Pac. (2d) 919, the Court said:

> "All that is necessary to make a decision of this court authoritative is that there shall appear to have been an application of the judicial mind to the precise question adjudged and that the point was fully considered." (91 Mont. @ 210)

In the *Severson* case the Montana Court, in stating that "a different rule prevails with relation to oil wells", was declaring the law of Montana, which follows the law as settled by the authorities generally, as has been heretofore pointed out. (This Br. pp. 20, 22 & 23).

The statement referred to can only mean that the cessation of production of oil automatically terminates a lease containing a "thereafter" clause such as is contained in the lease in question, even though cessation is because of no market.

In the case of *Union P. R. Co. v. Mason City & Ft. D. R. Co.*, 199 U. S. 160, this Court said:

> "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum." (p. 166)

See also:

*Florida Central R. R. Co. v. Schutte*, 103 U. S. 118;

*Van Dyke v. Parker*, (9th Cir.) 83 Fed. (2d) 35.

If the language of the Montana Court referred to is, in any sense, "dictum", it is, as said by this Court in *Hawks v. Hammill,* 288 U. S. 52, at page 58, "a considered dictum, and not comment merely obiter," and, consequently, controlling upon the Federal Court. Furthermore, as pointed out by the Circuit Court of Appeals for the Eighth Circuit in *Yoder, et al v. Nu-Enamel Corporation,* 117 Fed. (2d) 488, under the implications of *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, and *West v. American Tel. & Tel. Co.,* 311 U. S. 223:

> "* * * it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available,"

and

> "* * * Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed." (117 Fed. (2d) @ 489)

**D.**

**THE CIRCUIT COURT OF APPEALS FAILED TO FOLLOW THE LAW OF MONTANA RELATING TO THE CONSTRUCTION OF CONTRACTS, AND OIL AND GAS LEASES IN PARTICULAR.**

In its construction of the "thereafter" clause, the Circuit Court of Appeals has, in effect, read into the lease a provision declaring that it shall not terminate by cessation of production if the lessee cannot, by the exercise of reasonable diligence, market the

oil. Under the decisions of the Supreme Court of Montana, this cannot be done, and, as said in *Ruhlin v. New York Life Insur. Co.*, 304 U. S. 202, at page 209:

> "The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts."

Section 7529 of the Revised Codes of Montana of 1935 provides:

> "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

In the case of *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582, the court said:

> "A contract may not be changed or revised under the guise of interpretation. Where a contract is plain and clear in its terms, neither interpretation nor construction is permissible. (*Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279; *Spaulding v. Maillet*, 57 Mont. 318, 188 Pac. 377.) When the language employed by the parties 'is free from ambiguity or uncertainty, it is beyond the power of the court to enlarge or restrict its application or meaning'. (*Union Bank & Trust Co. v. Himmelbauer*, 56 Mont. 82, 181 Pac. 332.) And when the terms of a contract are plain and unambiguous, resort may not be had to extrinsic circumstances under the pretense of ascertaining its meaning." (75 Mont. @ 361)

In the case of *Story Gold Dredging Co. v. Wilson*, 99 Mont. 347, 42 Pac. (2d) 1003, the court said:

> "The ten-year provision of the contract is clear and unambiguous, and, 'where a contract is plain and clear in its terms, neither interpre-

> tation nor construction is permissible. * * * When the language employed by the parties 'is free from ambiguity or uncertainty, it is beyond the power of the court to enlarge or restrict its application or meaning'. (*McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582, 584, and cases cited.) 'Courts must enforce contracts as made, not make new ones for the parties, no matter how unreasonable the terms may appear.' (*McConnell v. Blackley*, 66 Mont. 510, 214 Pac. 64.)" (99 Mont. at 355)

This rule of construction is applied by the Supreme Court of Montana with greater strictness in the case of oil and gas leases than in the case of ordinary contracts. In *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582, the court said:

> "When a contract is optional in respect to one party it is to be construed strictly in favor of the party that is bound and against the one who is not bound. (*Eastern Oil Co. v. Smith*, supra; *Ireland v. Chatman*, 87 Okl. 223, 209 Pac. 408.) Not only that, but it is a recognized doctrine in this court that oil and gas leases are to be construed liberally in favor of the lessor and strictly against the lessee." (75 Mont. at 366)

Under the "thereafter" clause in the instant case, respondents clearly had the option of terminating the lease by ceasing production.

In *Stanolind Oil & Gas Co. v. Guertzgen*, 100 Fed. (2d) 299, which involved an appeal from the United States District Court of Montana, the Circuit Court of Appeals cited the McDaniel case and applied the above rule, but failed to do so in this case.

The effect of the decision of the Circuit Court of Appeals in this case is to protect respondents from a condition imposed by a contract which they entered into and, in fact, to make a new contract for the parties. The Supreme Court of Montana has declared that this cannot be done, even though the contract seems unreasonable. In *McNamer Realty Co. v. Sunburst, etc. Co.*, 76 Mont. 332, 247 Pac. 166, the court said:

> "We cannot protect the defendant from the condition imposed by a contract which it has entered into, nor make a new contract for the parties because their contract seems unreasonable." (76 Mont. @ 347)

It is clear that the Circuit Court of Appeals, in its decision, failed to apply the law of Montana relating to the construction of contracts.

**E.**

**UNDER THE LAW OF MONTANA, MATTERS OF AFFIRMATIVE DEFENSE, SUCH AS EXCUSES FOR NON-PRODUCTION, MAY NOT BE AVAILED OF IN AN ACTION OF THIS KIND.**

It is self evident that this action does not involve "forfeiture". Petitioners' right to relief depends solely upon whether the term of the lease expired pursuant to the "thereafter" clause upon cessation of production.

The distinction between "termination" and "forfeiture" of a lease is decided by the Supreme Court of Montana in *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 536, 243 Pac. 582, wherein the court said:

"Defendant urged plaintiff to give Day or

> his assignee the ten days' notice mentioned in the lease but this the plaintiff refused to do. His judgment was good. The notice was unnecessary. On the fifteenth day of June, 1922, the Day lease came to its end. It expired by limitation. It ceased automatically." (75 Mont. @ 368)

The question of whether a lease has "terminated" under a "thereafter" clause does not involve any inquiry as to whether the lessee has failed to fulfill any obligation. The "thereafter" clause simply defines the term of the lease and the lessee may, as in this case, by ceasing production, create the condition which terminates the lease without violating any obligation.

The Supreme Court of Montana has declared that equitable rules as to relief from a "forfeiture" are not applicable in an action of this kind. In *McNamer Realty Co. v. Sunburst, etc. Co.*, 76 Mont. 332, 247 Pac. 166, the court said:

> "Counsel further argue that, under the circumstances of this case, a forfeiture should not be decreed by a court of equity. In this counsel proceed under an erroneous assumption that this is an action for the cancellation of an instrument. Under the statute and under the complaint, the sublease is considered as a void instrument, only apparently valid on its face, and the relief sought is the clearing of the record or paper title of an apparent cloud existing because an instrument which has ceased to have any effect by reason of its termination still remains of record.
>
> The court was asked, not to declare a forfeiture, but 'to ascertain whether a completed forfeiture existed, and, if so, to remove the cloud.' (*Merk v. Bowery Mining Co.*, 31 Mont. 298, 78

Pac. 519). Under the facts and circumstances shown, as heretofore discussed, the equitable rules as to relief from a forfeiture cannot be applied." (76 Mont. @ 350-351)

In *Thomas v. Standard Development Co.*, 70 Mont. 156, 224 Pac. 870, the Supreme Court of Montana said:

> "We wish to advert to the proposition that in the decree the trial court adjudged and decreed that the lease was 'forfeited'. If it was the intention of the court to use the term 'forfeited' in its strict and technical sense, that portion of the decree was incorrect. It is apparent, however, that the term was used as synonymous with the word 'terminated' as we have used it herein. In any event, it is immaterial what language was used, since by its decree the title was quieted in plaintiffs." (70 Mont. @ 176)

**F.**

**THE CIRCUIT COURT OF APPEALS DECIDED THIS CASE UPON THE BASIS OF WHAT IT THINKS THE SUPREME COURT OF MONTANA MIGHT DO IN A SIMILAR CASE INSTEAD OF ACCORDING TO THE EXISTING LAW OF MONTANA.**

Referring to the *Severson* case, the Circuit Court of Appeals said:

> "a careful study of the case as well as the earlier decisions of the Montana court, persuades us that a like fiction would be resorted to in a situation comparable with the present." (R. 478)

This is not a declaration of the law of Montana

but an assumption by the Circuit Court of Appeals of what it thinks the Montana Supreme Court may declare the law to be at some time in the future.

In indulging in this assumption, the Circuit Court of Appeals failed to follow the decision of this Court in *Erie R. Co. v. Tompkins*, 304 U. S. 64, and has done what this Court in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U. S. 487, said cannot be done. In that case the Court said:

> "* * * the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be." (p. 497).

The language of the Circuit Court of Appeals, last quoted, conclusively proves that it has applied a rule which the Supreme Court of Montana in the *Severson* case specifically said is not applicable to a case involving oil.

The statement of the Circuit Court of Appeals that "the earlier decisions of the Montana Court", as well as the *Severson* case, persuaded it that a like fiction would be resorted to in a situation comparable with that presented by this case is difficult to understand. We have been unable to find any Montana case which so indicates. In every Montana case involving an oil and gas lease, the Supreme Court of Montana has adhered to what it said in *McDaniel v. Hager-Stevenson Oil Co.*, supra, to-wit:

> "It is a recognized doctrine in this court that oil and gas leases are to be construed liberally in favor of the lessor and strictly against the lessee." (75 Mont. @ 366).

G.

**THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS IS ALSO IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT IN THE CASE OF CONTINENTAL OIL CO. v. OSAGE OIL & REFINING CO., 69 FED. (2d) 19, WHICH DECISION PETITIONERS CONTEND IS IN ACCORD WITH THE DECISIONS OF THE SUPREME COURT OF MONTANA.**

Petitioners present this contention with a full recognition of the fact that since the decision of this Court in *Erie R. Co. v. Tompkins,* 304 U. S. 64, "conflict among circuits is not of itself a reason for granting a writ of certiorari", as to questions controlled by state law. (*Ruhlin v. New York L. Ins. Co.,* 304 U. S. 202, at 206). However, we respectfully submit that where a decision of another circuit court of appeals is in accord with the decisions of the Supreme Court of a state and the decision of the Circuit Court of Appeals in the case under consideration is in conflict with that decision, it is an additional reason why this Court should grant a petition for writ of certiorari.

In *Continental Oil Co. v. Osage Oil & Refining Co.,* 69 Fed. (2d) 19, at p. 23, the Circuit Court of Appeals for the Tenth Circuit said:

> "* * * If oil is being produced from the land in paying quantities at the end of the definite term, the lease continues so long as oil is so produced, but when production ceases the lease is at an end (*United States v. Brown* (D. C. Okl.) 15 F. (2d) 565, 567)"

See also:

*Smith v. U. S.*, (10th Cir.), 113 Fed. (2d) 191, at p. 193.

We contend that that decision is in full accord with the law of Montana and that, if the decision in this case is allowed to stand, it will result in lack of uniformity, not only between the federal court and the state court, but between Circuit Courts of Appeal.

## H.

### THE IMPORTANCE OF THE QUESTIONS INVOLVED.

It is common knowledge that practically every Montana oil and gas lease contains a "thereafter" clause similar to the one in question, and that the production of oil is one of Montana's principal industries. Under the decision of the Circuit Court of Appeals, the term of every lease containing such a clause remains uncertain, even though it is clearly defined in the "thereafter" clause thereof.

It is of the utmost importance that there be uniformity between the decisions of the courts of Montana and the Federal Courts with reference to the construction of such a "thereafter" clause, and that the effect of such a clause should not be dependent upon the court in which the case is tried.

Certain undisputed facts aptly illustrate the effect of the decision of the Circuit Court of Appeals in this case upon the rights of the lessors of oil lands.

The uncontroverted documentary evidence, consisting of certified copies of verified reports filed with the Montana State Board of Equalization by respondent Tarrant and the three companies which

he managed and controlled, (R. 398-408) disclose that he marketed, during the period of non-production from petitioners' land, more than 143,000 barrels of oil and stored with a common carrier pipe line company, whose pipe connected with petitioners' wells, more than 25,000 barrels of oil from 15 other leases in the Cut Bank field in which petitioners' land is situated. These reports are plaintiffs' exhibits 36 to 40, (R. 102-108), 58 and 59, (R. 322-340), and are summarized in plaintiffs' exhibit 64, (R. 353, 355 & 357).

Of the 143,000 barrels of oil so marketed by respondent Tarrant, all but 3172.91 barrels were produced from leases from which respondent Tarrant and his companies would receive more than 70% of the oil, (R. 353, 355 & 357). Of the oil which could have been produced from petitioners' land, respondent Tarrant would have received less than 25% of the oil. (R. 353, 355 & 357). Respondent Tarrant testified that for the royalties which he sold he received an average of one thousand dollars per one percent. (R. 363).

There is no explanation in the record as to why respondent Tarrant was not able to market and store oil which could have been produced from petitioners' land and was able to and did market and store oil from other leased lands in the immediate vicinity.

Under this decision any lessee who owns more than one lease may produce and market from those which are profitable to him and fail to produce from those which are not, without having the un-

profitable leases declared terminated even though the "thereafter" clause definitely so provides.

Such a situation will not only affect the rights of individuals but also the economic development of oil lands.

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For the foregoing reasons, it is respectfully submitted that the writ should issue.

Dated, Helena. Montana, March 31, 1943.

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No. 884

FILED
MAY 4 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

OCTOBER TERM, 1942.

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JANE M. STIMSON and BLANCHE M. NEWMAN,
Petitioners,

vs.

R. C. TARRANT and BARNES, BUTLER OIL COMPANY, a corporation,
Respondents.

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## BRIEF OF RESPONDENTS OPPOSING GRANTING OF WRIT OF CERTIORARI

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Filed....., 1943.

.....Clerk.

## SUBJECT INDEX


| Section | Subject | Pages |
|---|---|---|
| I | Supplemental Statement of Material Facts Involved | 3–10 |
| II | Petitioners State No Valid Grounds for Issuance of Writ of Certiorari | 10–13 |
| | (a) Decision of Circuit Court of Appeals and District Court will not be disturbed under Rule in MacGregor v. State Mutual Life Assurance Co., 315 U. S. 280 | 10–11 |
| | (b) Under Rule in Ruhlin v. New York Life Insurance Co., 304 U. S. 202, alleged conflict between Circuits is not ground for granting writ | 12–13 |
| III | Petitioners Do Not Present Controlling Law of Montana | 14–24 |
| | (a) Lease required notice from petitioners to respondents before termination thereof and since no notice was given lease is still in force | 14 |
| | (b) Even in absence of such notice lease did not terminate because of temporary shutting in of wells when no market or storage facilities were available | 15 |
| | (c) Covenant to market oil was an implied covenant and where the operator uses due diligence to find a market, he has fulfilled the implied covenant | 15–19 |
| | (d) Statement of Supreme Court of Montana in Severson v. Barstow, 103 Mont. 526, a gas case, that a different rule prevails with relation to oil wells as oil, unlike gas, may be stored and divided, is dictum | 19–20 |
| | (e) Oil and gas leases must be read as a whole and, if possible, every part be given effect; such leases will be interpreted by the Courts as written by the parties | 21–22 |
| | (f) Lessor may contract with lessee to waive performance of covenants relative to drilling wells or marketing oil | 22–23 |

SUBJECT INDEX—Continued

| Section | Subject | Pages |
|---|---|---|
| | (g) Provision in the lease for notice from lessors and allowance of thirty days to cure claimed default was a contract waiving automatic termination of lease | 23–24 |
| IV | Decision of the Circuit Court of Appeals Is Not in Conflict With Decisions of the Montana Supreme Court | 25–29 |
| | (a) Petitioners do not distinguish between breach of express covenant and an implied covenant to market oil | 25–27 |
| | (b) Where ordinary diligence to perform the implied covenant is used, there is no breach of the implied covenant | 26–27 |
| | (c) Continental Oil Co. v. Osage Oil & Refining Co., 69 Fed. (2d) 19 is not in conflict with Montana law | 27 |
| | (d) Decision of Circuit Court of Appeals in case at bar was in harmony with the Montana law | 28–29 |

TABLE OF AUTHORITIES CITED

| | Pages |
|---|---|
| Alabama Power Co. v. Ickes, 302 U. S. 464, 82 L. Ed. 374 | 29 |
| Berthelote v. Loy Oil Co., 95 Mont. 434, 28 Pac. (2d) 187 | 9, 16, 17, 25 |
| Brewster v. Lanyon Zinc Co., (8th C. C. A.) 140 Fed. 801 | 16, 17 |
| Continental Oil Co. v. Osage Oil & Refining Co., 69 Fed. (2d) 19 | 11, 12, 27 |
| Elliott v. Crystal Springs Oil Co., 106 Kans. 248, 187 Pac. 692 | 20 |
| Empire Theatre Co. v. Cloke et al, 53 Mont. 183, 163 Pac. 107 | 19–20 |
| Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188 | 27 |

AUTHORITIES CITED—Continued


| | Pages |
|---|---|
| Griffith v. Cedar Creek Oil & Gas Co., 91 Mont. 553, 8 Pac. (2d) 1071 | 9 |
| Hinerman v. Baldwin, 67 Mont. 417, 215 Pac. 1103 | 21-22 |
| MacGregor v. State Mutual Life Assurance Co., 315 U. S. 280, 86 L. Ed. 846 | 11 |
| McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. 582 | 22, 25 |
| McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 Mont. 332, 247 Pac. 166 | 5, 26 |
| Mettler v. Ames Realty Co., 61 Mont. 152, 201 Pac. 702 | 20 |
| Nadeau v. Texas Co., 104 Mont. 558, 69 Pac. (2d) 586 | 22-23 |
| Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290 | 12, 12-13, 27 |
| Sauder v. Mid-Continent Petroleum Corporation, 292 U. S. 272, 78 L. Ed. 1255 | 16 |
| Severson v. Barstow, 103 Mont. 526, 63 Pac. (2d) 1022 | 16, 17-18, 19, 25 |
| Stanolind Oil Co. v. Guertzen, 100 Fed. (2d) 299 | 17 |
| Steven v. Potlatch Oil & Refining Co., 80 Mont. 239, 260 Pac. 119 | 22, 24 |
| Stimson v. Tarrant, Case at Bar, 132 Fed. (2d) 363 | 17 |
| Story Gold Dredging Co. v. Wilson, 99 Mont. 347, 42 Pac. (2d) 1003 | 26 |
| Sunburst Oil & Refining Co. v. Callender, 84 Mont. 178, 274 Pac. 834 | 5, 22, 24 |

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## BRIEF OF RESPONDENTS OPPOSING GRANTING OF WRIT OF CERTIORARI

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### I.

### FACTS SUPPLEMENTAL TO THOSE STATED IN PETITION AND BRIEF OF PETITIONERS

The summary statement of petitioners of the matter involved is not sufficient to enlighten this Court as to the facts material to granting or denying petitioners' petition for a writ of certiorari.

This is a suit in equity, commenced on February 6, 1940, to procure a decree adjudging that the oil and gas lease involved herein terminated as of January 1, 1938, and to cancel the lease, as constituting a cloud upon the title of petitioners (R. 5).

Relief is also prayed for an accounting for the oil and gas extracted from the premises since January 1, 1938, and an injunction prohibiting respondents from removing oil and gas from the premises, and for general relief (R. 5).

The oil and gas lease (R. 6-12) was made December 8, 1930, between Alice Long Miller, ancestor of petitioners, and respondent Barnes, Butler Oil Company.

So far as material here, the lease provides:

1. That in consideration of $320.00, paid at the time of the execution of the lease, and of the covenants and agreements on the part of the lessee to be paid, kept and performed, the lessor granted, demised, leased and let unto the lessee for the sole and only purpose of mining and operating for oil and gas and of laying pipelines and of building tanks, power stations and structures thereon to produce, save and take care of said products, land situated in Glacier County, Montana, particularly described.

2. That the lease shall remain in force for a term of five years from the date thereof and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

3. That one-eighth or 12½% of all oil and gas produced shall be delivered to the credit of the lessor, free of cost, in the pipeline to which lessee may connect the wells.

4. That if no well be commenced on said land on or before the 8th day of December, 1931, the lease shall terminate as to both parties, unless the lessee, on or before that date, shall pay or tender to the lessor, at a place specified therein, $320.00, which shall operate as a rental and cover the privilege of deferring the commencement

of a well for twelve months from December 8, 1931, and in like manner such payments so made shall defer the time of commencement of the well.

5. Provision is made for drilling a second well if the first well drilled is non-productive.

6. The following provision of the lease, no mention of which is made in the petition or brief of petitioners, but which is of vital importance herein, reads as follows (R. 10):

> "If lessee shall fail to commnece the drilling of any well herein provided for within the time specified (unless the time is extended by the payment of rental), all of lessee's rights hereunder shall thereupon terminate at the option of lessor. If lessee shall fail to perform any of the other terms or conditions hereof, then all of his rights hereunder shall terminate, unless lessee shall perform the same within thirty days after written notice from lessor specfying the condition or conditions wherein lessee is at fault which notice may be mailed lessee at Cut Bank, Mont."

The lessee assigned the lease to respondent R. C. Tarrant on July 18, 1932 (R. 12-14) and required the commencement of a well on or before October 18, 1932, and to drill at least one well a year until eight wells were completed on the land (R. 12-14).

The instrument designated as an assignment (R. 12-14) was in fact a sub-lease.

Under the law of Montana, if a lessee grants an interest less than his own, it is a sub-lease and not an assignment.

> McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 Mont. 332, 247 Pac. 166;
>
> Sunburst Oil & Refining Co. v. Callender, 84 Mont. 178, 274 Pac. 834.

The respondent Tarrant, prior to October 18, 1932, commenced the drilling of the first well (R. 117-118) and completed it May 15, 1933 (R. 179). It was a producer (R. 119). It was connected with a pipeline and at all times thereafter has produced, or been capable of producing, oil. A second well, a dry hole, was completed December 3, 1933 (R. 170). A third well, a producer, was completed December 4, 1934 (R. 170). A fourth well, a dry hole, was completed December 4, 1935 (R. 170). A fifth well, a producer, was completed June 3, 1936 (R. 170). A sixth well, a dry hole, was completed October 21, 1937 (R. 170). A seventh well, a dry hole, was completed March 31, 1939 (R. 170).

These wells cost the respondent Tarrant $82,470.85 (R. 179). His operating expenses to the date of the trial amounted to $45,937.14 (R. 179).

Owing to lack of market, the well required to be drilled in the year 1938 was postponed by agreement of the lessee and sub-lessee until the year 1939 (R. 124-126). It was completed March 31, 1939 (R. 179).

By agreement between the lessee and the sub-lessee, further drilling of wells after this suit was commenced on February 6, 1940, was postponed until the termination of the suit (R. 127-129).

For three years prior to the end of 1938, the producing wells were connected with the pipeline of the Toronto Pipeline Company and the oil from the wells was transported to the Canadian market (R. 130). Before the end of 1937 the Toronto Pipeline Company notified the respondents, whose wells were connected with its lines in the Cut Bank field, that it would not receive any oil after the end of that year (R. 417).

Thus, the Canadian market was lost to all producers of oil in the Cut Bank field and they were without a market at the end of the year 1937 (R. 133).

The conditions in the oil industry were such as that producers in the Cut Bank field were unable to sell their production and, unles they had an immediate market, pipeline companies refused to store the oil (R. 143). Since respondent Tarrant did not have any immediate market, no other pipeline would connect with these wells and there was not a market nor storage for the oil which the wells would produce (R. 136).

In January, 1938, respondent Tarrant filled all the storage capacity used in connection with said lease and shut the wells in because of lack of market and storage faciilities (R. 56). He then set about to make a market for the oil from these wells, and by investing $100,000.00 in a small refinery at Cut Bank, Montana, to expand it, and granting a credt to oil producers of another $100,-000.00 (R. 56-57), he finally obtained a market for the oil from the lease involved, and reopened the wells about March 1, 1939, which have been continuously pumping oil since that time.

On November 15, 1937, he notified the petitioners that he would have to shut the wells in because of lack of market and storage facilities and keep them shut in until another market was found (R. 417).

From time to time thereafter, although not in privity with the petitioners, he kept them informed as to the situation with respect to a lack of market or storage facilities. (R. 187; R. 191; R. 207; R. 222-224; R. 417; R. 419; R. 421-422; R. 424-425; R. 426; R. 427; R. 429-431; R. 432.)

They made no objection. They did not, as required by the lease, give any notice to the lessee to the effect that they claimed any default in the performance of the conditions of the lease by the respondents (R. 59-60).

The wells were reopened about March 1, 1939, after respondent Tarrant had made a market for the oil. He continud to pump all the oil from the wells and market it down to the date of the trial, December 19, 1940 (R. 57).

There was no drainage of oil from the structure and no intention on the part of respondents to abandon the lease (R. 473).

Nearly eleven months after the wells were reopened, and on February 6, 1940, this action was commenced.

Petitioners' theory in the District Court and the Circuit Court of Appeals was that the lease terminated in January, 1938, on the shutting in of the wells.

They have at all times ignored the provision of the lease requiring them to give notice to the lessee of any claimed default and to allow thirty days within which to cure such default.

The District Court found that the failure to give such notice might of itself be sufficient to warrant a dismissal of the case without further consideration of other facts in the record (R. 63). However, the District Court did examine the other facts and found that the respondents had exercised due diligence and reasonable care and skill such as reasonably prudent operators would use, in endeavoring to market the oil (R. 58), and that was all which was required of the respondents. The case was dismissed (R. 69-70).

It has always been the law of Montana that where

notice is required to forfeit a lease, such notice must be given by the lessor.

It has always been the law of Montana that where due diligence, reasonable care, and ordinary skill of reasonably prudent operators are exercised by the operator in the performance of an implied covenant, the lease will not be terminated or forfeited for breach of such covenant.

The District Court had those rules of Montana law in mind and, in part, based its decision thereon.

In the Circuit Court of Appeals the petitioners based their contention that the lease terminated on the shutting in of the wells, on the decisions of the Supreme Court of Montana in Berthelote v. Loy Oil Company, 95 Mont. 434, 28 Pac. (2d) 187, and Griffith v. Cedar Creek Oil & Gas Company, 91 Mont. 553, 8 Pac. (2d) 1071. They took the position that there was not any decision of the Supreme Court of Montana directly in point, but that the two decisions above mentioned left no doubt as to the construction which the Montana Supreme Court would place upon the lease.

At page 26 of their brief in the Circuit Court of Appeals, they say:

> "While there is no Montana case wherein the question of termination under the habendum clause for cessation of production of oil after the primary term, as distinguished from a forfeiture for non-production of gas has been decided, our Supreme Court, in two cases, has left no doubt as to its construction of such an habendum clause and that it follows the decisions hereinbefore cited."

Thus, the petitioners submitted the case to the Circuit Court of Appeals on the theory that the Montana Supreme Court had not passed directly upon the point.

The Circuit Court of Appeals found that there was no reported case from Montana directly deciding the point and, after discussion of Montana decisions wherein is recognized the rule that where due diligence, reasonable care, and ordinary skill are used by the operator, a lease will not be forfeited for alleged breach of an implied covenant to market oil, among other things, said (R. 479):

> "In the situation before us the enforced closing down of the wells involved no loss from drainage. There was no intention to abandon the lease. And the storage of the oil underground was as effective as its storage in surface tanks, and obviously more economical. What the lessee did was in the mutual interest of the parties."

There is no decision of the Supreme Court of Montana to the effect that a lease automatically terminates where the lessor claims breach of the implied covenant to market oil, when the evidence reveals that the operator was using due diligence, reasonable care, and ordinary skill in attempting to perform such implied covenant.

Upon this brief resume of the important facts, it is apparent that no meritorious question is presented by the petition for certiorari or the brief in support thereof.

## II.

## PETITIONERS STATE NO VALID GROUNDS FOR ISSUANCE OF WRIT OF CERTIORARI

The only grounds upon which petitioners rely, are as follows:

1. That the Circuit Court of Appeals did not follow the decisions of the Supreme Court of Montana in affirming the decree of the District Court;

2. That the decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of

Appeals for the Tenth Circuit in Continental Oil Company v. Osage Oil & Refining Company, 69 Fed. (2d) 19.

The first ground appears to us to be answered by this Court in MacGregor v. State Mutual Life Assurance Company, 315 U. S. 280, 86 L. Ed. 846, wherein this Court says:

> "No decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan."

The federal judge who tried this case in the District Court, Hon. Charles N. Pray, assumed his office February 11, 1924 (294 Fed. viii), and is a judge of long experience and of outstanding ability. He came to the bar of Montana about forty-five years ago (24 Mont. v).

Likewise, the judges who presided in the Circuit Court of Appeals are men of long experience as judges and as members of the bar, and are of outstanding ability.

To escape the force of the rule announced by this Court in the MacGregor case, petitioners contend in this Court that the decisions of the Montana Supreme Court, discussed in the opinion of the Circuit Court of Appeals, directly hold that where there is no market for oil and no storage facilities, a lease of the character of the one involved herein terminates at the moment the wells are shut in.

That contention, although incorrect, is the only escape they have from the rule in the MacGregor case.

Elsewhere in this brief we shall show that petitioners have misconstrued many of the decisions of the Supreme Court of Montana.

The second ground upon which petitioners rely to obtain a writ of certiorari is equally untenable.

While they recognize the rule announced by this Court in Ruhlin v. New York Life Insurance Company, 304 U. S. 202, 82 L. Ed. 1290, wherein this Court held that conflict among federal Circuit Courts of Appeal is not of itself a reason for granting a writ of certiorari, because the conflict may be merely corollary to a permissible difference of opinion in the state courts, they seek to escape the force of that rule by urging that the Circuit Court of Appeals for the Tenth Circuit, in Continental Oil Company v. Osage Oil & Refining Company, 69 Fed. (2d) 19, is in accord with the law of Montana and therefore this Court should review the decision of the Circuit Court of Appeals for the Ninth Circuit in this case.

As a matter of fact, the Continental Oil Company case does not announce the law of Montana relative to the questions decided by the Circuit Court of Appeals in this case. If it did, that would be no ground, under the present status of the law, for this Court to issue its writ of certiorari in this case.

Necessarily there must be conflict between Circuit Courts of Appeal in different circuits if each circuit is to apply the law of the state whence the case was lodged in the Circuit Court of Appeals.

It seems clear that what this Court said in Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290, as to the rule of "conflict of circuits," determines the second ground of petitioners' petition adversely to them. This Court said:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for

granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore probably in conflict with the state law as yet unannounced by the highest court of the State.

"No decision at the present time could reconcile any 'conflict of circuits,' or do more than enunciate a tentative rule to guide particular federal courts."

Petitioners make no showing that any question of important local law, when all the decisions of the Montana Supreme Court are considered, as they must be, was incorrectly decided by the Circuit Court of Appeals.

The question is of no more importance than any other question which arises out of the application of the law of oil and gas to the facts in any case involving such law.

Their complaint is not so much to the point that the decision of the Circuit Court of Appeals was wrong as it is that the Court found that a statement in one of the Montana cases upon which the Circuit Court of Appeals relied, was a dictum.

Such contention of petitioners does not escape the force of this Court's decision in the Ruhlin case.

Thus it appears that the grounds urged by petitioners for the issuance of a writ of certiorari are both untenable in view of the decisions of this Court in the MacGregor and Ruhlin cases.

## III.

## PETITIONERS DO NOT PRESENT THE CONTROLLING LAW OF MONTANA APPLICABLE TO THE FACTS IN THIS CASE

The express covenants of the lease, providing for its termination, are as follows:

1. If lessee shall fail to commence the drilling of any well herein provided for within the time specified, unless the time is extended by the payment of rental, all of lessee's rights hereunder shall thereupon terminate at the option of the lessor (R. 10).

Rentals were paid and wells drilled as provided for in the lease. No question is here presented concerning that covenant.

2. If lessee shall fail to perform any of the other terms or conditions hereof, then all of his rights hereunder shall terminate, unless lessee shall perform the same within thirty days after written notice from lessor specifying the condition or conditions wherein lessee is at fault which notice may be mailed lessee at Cut Bank, Montana (R. 10).

That covenant was not performed by the lessor or her successors in interest. No notice of any claimed breach of any condition of the lease was ever given by lessor or her successors in interest to the respondents (R. 59-60, 170).

Ignoring this express covenant, petitioners now assert that because the wells were shut in for lack of market or storage facilities, from the latter part of January, 1938, to about March 1, 1939, the lease automatically terminated as of January 1, 1938.

This assertion was first made when the suit was filed, on February 6, 1940, about eleven months after respondents reopened their wells and paid the landowner's royalties to the administrator of the estate of petitioners' ancestor, who was in possession of the royalties at the time of the trial of the suit (R. 249-250).

Petitioners assert that some decisions of the Supreme Court of Montana warrant their contention that as soon as the wells were shut in because of lack of market and storage facilities, the lease terminated.

There is no decision in the Supreme Court of Montana so holding or even pointing in that direction.

The contention of petitioners is that respondents breached an implied covenant in the lease to market the oil.

The District Court found that after the market upon which the oil theretofore produced had been sold had ceased, the respondent Tarrant set about endeavoring to find a market on which he could sell the nine hundred barrels of oil then in storage on the land, and that "he used such reasonable care and diligence in attempting to find such market for said oil as a reasonably prudent and careful person engaged in the oil production business would have used under the circumstances * * *." (R. 56.)

Petitioners have overlooked the fact, sustained by the decisions of the Supreme Court of Montana, that the implied covenant to market oil or gas after discovery, requires that the operator use such reasonable diligence in producing and marketing gas and oil as would be exercised by the ordinarily prudent person under similar

circumstances. That is a question of fact which will depend upon the facts and circumstances of each case.

Berthelote v. Loy Oil Co.,
95 Mont. 434, 28 Pac. (2d) 187;

Severson v. Barstow,
103 Mont. 526, 63 Pac. (2d) 1022.

That rule has an ancient and honorable ancestry. It was forcefully announced in Brewster v. Lanyon Zinc Company, (8th C. C. A.) 140 Fed. 801, by Mr. Circuit Judge VanDevanter, wherein, with respect to implied covenants, it is said:

> "Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as the quantity of oil and gas capable of being produced from the premises, as indicated by prior exploration and development, the local market or demand therefor or the means of transporting them to market, the extent and results of the operations, if any, on adjacent lands, the character of the natural reservoir—whether such as to permit the drainage of a large area by each well—and the usages of the business. Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required."

This rule was approved by this Court in Sauder v. Mid-Continent Petroleum Corporation, 292 U. S. 272, 78 L. Ed. 1255.

From the beginning of the development of the law of oil and gas in Montana, the Supreme Court has many times relied upon what is said in Brewster v. Lanyon Zinc Company, supra. In fact, substantially all of the federal and state courts of this nation have adopted that rule.

Sauder v. Mid-Continent Petroleum Corporation,
292 U. S. 272, 78 L. Ed. 1255.

In both the Berthelote and Severson cases, so strongly relied upon by petitioners, Brewster v. Lanyon Zinc Company, supra, is cited and relied upon.

After canvassing the Montana decisions, some of which are relied upon by petitioners, the Circuit Court of Appeals for the Ninth Circuit, in Stanolind Oil Company v. Guertzen, 100 Fed. (2d) 299, although treating a question different from that here, recognized that rule, and in this case, under the same title as here, in 132 Fed. (2d) 363, applies the rule to this case.

In Berthelote v. Loy Oil Company, 95 Mont. 434, 28 Pac. (2d) 187, the Supreme Court of Montana says:

> "It is generally held that where, as here, the only benefit to be received by the lessor is the royalty, a covenant is implied whereby the lessee, after the discovery of oil or gas, is bound to work and operate the lease with reasonable diligence so as to bring the product to a present market and to yield to the lessor his royalties. (Citing cases.)
>
> * * * * * *
>
> "The implied covenant to market gas after discovery does not require the lessee in every instance to market the same, nor does the failure to so market the product result in a breach of the covenant in every case. The standard of compliance with this implied covenant to use reasonable diligence in producing and marketing gas is the diligence which would be exercised by the ordinarily prudent persons under similar circumstances. Summers on Oil & Gas, p. 22; Strange v. Hicks, 78 Okla. 1, 188 P. 347. This is a question of fact that will depend upon the facts and circumstances of each case."

In Severson et al v. Barstow et al, 103 Mont. 526, 63 Pac. (2d) 1022, it is said:

> "Where, as here, the principal consideration for a lease is the payment of royalty, the lease carries an implied covenant to use reasonable diligence to market

the product when produced, although the lease is silent on the subject, and whatever is implied in a contract is as effectual as what is expressed; in an action to cancel such a lease, the burden rests upon the lessee to establish the fact of reasonable diligence if he would prevent cancellation.

* * * * * *

Where neither party is at fault, it would be inequitable to permit the lessees to hold the land for years without action or profit, on the mere hope that at some indefinite time a market would be developed, and, on the other hand, it would be inequitable, after lessees have expended a considerable amount of money in drilling wells, to cancel the entire lease and thus entirely extinguish that hope."

Thus, it will be observed that petitioners have misconstrued the rule announced by the Montana Supreme Court as to the nature and performance of the implied covenant to market oil or gas.

The petitioners, in their statement of the nature and requirement of performance of such implied covenant, argue that it is absolute, rigid and inflexible, and if for any reason, whether within or beyond the control of the operator, oil or gas is not marketed, the lease ipso facto terminates.

That is not the meaning or scope of the rule followed by the Montana Supreme Court. In effect it holds that whether such implied covenant is breached depends on the facts as to whether the operator has used the degree of diligence, care and skill which the ordinarily prudent operator, under the circumstances, would have used.

The two decisions above quoted from follow that rule

There is no decision of the Supreme Court of Montana following the rule contended for by the petitioners. However, petitioners contend that the following sentence in the

decision in the Severson case supports their argument. That sentence reads as follows:

> "The lessees here met this requirement, and, while a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided, in legal contemplation, under the facts shown, this gas well was 'producing' within the meaning of the lease. (Mills & Willingham on Oil and Gas, 121; Berthelote v. Loy Oil Co., supra; Pelham Petroleum Co. v. North, 78 Okla. 39, 188 Pac. 1069.)"

The District Court held that what is said in that sentence is not convincing (R. 67).

The Circuit Court of Appeals treats that part of the sentence which reads "* * * while a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided * * *" as dictum, and holds that the dictum is less significant than the general spirit of the opinion (R. 479).

Petitioners argue that because the Circuit Court of Appeals did treat such statement as dictum, it decided the case contrary to the law of Montana, and insist that the statement is not dictum.

It must be remembered that in the Severson case the production of oil was not involved. No question is raised in the case as to what the rule would be if oil wells were shut in for lack of market or storage facilities. The statement as to such rule was purely gratuitous.

Of such statements in decisions of the Supreme Court, the Montana Supreme Court has said:

> "An obiter dictum is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."

Empire Theatre Co. v. Cloke et al,
53 Mont. 183, 163 Pac. 107.

And, again, that Court says:

" 'If the writer of a judicial opinion has permitted his pen to move too fast and gone beyond the exigencies of the case, it is the strength of our system of remedial justice that his words lose their authority, as soon as the bounds of necessity are passed.' "

Mettler v. Ames Realty Co.,
61 Mont. 152, 201 Pac. 702.

Under these definitions, clearly the sentence in the Severson case above quoted, was dictum. It is not even binding on the Supreme Court of Montana.

It is to be noted that the Montana Court did not say what the rule would be if there were no market or storage facilities for the oil.

Petitioners assume that the dictum means that if oil, although there is no market or storage facilities to take care of it, is not marketed or stored, then the lease automatically terminates.

The Montana Court made no such statement. It refused to follow such rule as announced in Elliott v. Crystal Springs Oil Co., 106 Kans. 248, 187 Pac. 692, and by so refusing to follow such rule, it is apparent that the decision in the Severson case is contrary to petitioners' contention.

It is upon the erroneous statement of the rule as to the performance of implied covenants to market oil or gas and upon this dictum that petitioners have predicated their whole case in presenting it to this Court by their petition and brief.

In so doing the petitioners have ignored an express covenant in the lease.

As above pointed out, failure to perform any of the terms or conditions of the lease other than drilling a well would terminate the lease, unless lessee shall perform the same within thirty days after written notice from the lessor, specifying the condition or conditions wherein lessee is at fault.

Since no such notice was given (R. 59-60, 170) the lessor and her successors in interest treated the lease at all times, until the filing of this suit, as in full force and effect.

We agree that the lease must be enforced as written by the parties. Courts will not write new leases for the parties.

In Hinerman v. Baldwin, 67 Mont. 417, 215 Pac. 1103, the Montana Court states the rule always adhered to by it, as follows:

> "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. (Sec. 7527, Rev. Codes 1921.) And the language of the contract is to govern its interpretation, if the language is clear and specific and does not involve an absurdity. (Id. 7529.) Contracts must receive such an interpretation as will make them operative and capable of being carried into effect, if this may be done without violating the clear intention of the parties. (Id. 7534.) Particular clauses of a contract are subordinate to its general intent. (Id. 7541.) Applying those fixed rules of interpretation of contracts, there is no avenue of escape from the lease open to the plaintiff.
>
> "There is no legal impediment shown which would prevent the parties from entering into any contract which they saw fit, nor from expressing it in language of their own, and under such circumstances it is the duty of the court to give effect to the meaning and intention of the parties as expressed in the language em-

ployed. The court has no right to make a contract for the parties different from that actually entered into by them. 'Courts enforce contracts as made, unless good morals or public policy are contravened. They cannot create a new contract, nor can they permit the parties themselves to do so without the consent of all, upon any theory that the original contract was not the most beneficial or advantageous, or that the enterprise contemplated by its terms cannot be successfully operated under it.' (6 Cal. Jur., sec. 192.)"

An oil and gas lease must be read as a whole and, if possible, every part be given effect.

Steven v. Potlatch Oil & Refining Co.,
80 Mont. 239, 260 Pac. 119;

Sunburst Oil & Refining Co. v. Callender,
84 Mont. 178, 274 Pac. 834.

Any provision of a lease as to the conditions under which lessor may terminate or forfeit the same is for the benefit of the lessor.

McDaniel v. Hager-Stevenson Oil Co.,
75 Mont. 356, 243 Pac. 582.

It may be waived by the lessor, if he sees fit to do so.

Steven v. Potlatch Oil & Refining Co.,
80 Mont. 239, 260 Pac. 119.

The latest pronouncement of the Montana Supreme Court upon this point is in Nadeau v. Texas Company, 104 Mont. 558, 69 Pac. (2d) 586, wherein the Montana Supreme Court says:

"Defendant contends that, since the Reynolds lease was an 'unless' lease and the rentals were not paid and no drilling was done strictly in accordance with the terms of the lease, it was ipso facto terminated upon failure to comply with these provisions, citing in support of its contention the cases of McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. (2d) 1071, Williard v. Campbell, 91 Mont. 493, 11 Pac. (2d) 782, and Berthelote v. Loy Oil Co., 95 Mont. 434, 28 Pac.

(2d) 187. While we have said in these and many other cases that an 'unless' lease ipso facto terminates upon the failure of the lessee to drill or pay delay rentals as provided in the contract, yet none of these cases, with possibly one exception, involved the right of the lessor to waive or extend the time of performance of such terms by agreement.

* * * * * *

A lessor in an 'unless' lease waives his power to declare a forfeiture for failure to drill or pay rentals within the time designated by the lease, by the acceptance of delay rentals after the breach has occurred. (Citing cases.)

* * * * * *

Likewise a lessor may waive his power of forfeiture for breach of the condition of the lease to drill or pay delay rentals, by a contract extending the time for commencement of drilling operations or the payment of delay rentals. (Citing cases.)"

That decision was rendered on May 26, 1937, and was in effect when the case at bar was tried.

It is now the law of Montana that an express covenant in a lease, requiring the lessee to drill or pay rental, may be waived by the lessor by a contract extending the time for the performance of such express covenant.

No reason is apparent why lessor may not contract as to the terms upon which the breach of an implied covenant may be waived.

The lessor herein contracted with the lessee that if lessee failed to perform any of the implied covenants of said lease, then its rights under the lease shall terminate, unless the lessee performed such covenant within thirty days after written notice from the lessor, specifying the condition or conditions wherein lessee is at fault.

Thus, by her own contract, the lessor agreed that any

claimed failure of the lessee to perform the implied covenant to market the oil would not terminate the lease unless lessor gave the notice required. This she or her successors in interest did not do (R. 59-60, 170).

Hence, the lessor and her succesors in interest have at all times been precluded by the express terms of the lease from claiming or asserting that at any time, for any reason, the lease herein terminated.

In addition to that fact, it was proved, and the District Court found (R. 56), that the respondents used reasonable care and diligence in attempting to find a market so as to market the oil, to the extent that a reasonably prudent and careful person engaged in the oil production business would have used under the circumstances.

Upon these grounds it is clear that petitioners' contentions in this branch of their case are without merit.

They were required to do what the contract required of them as much as was the lessee. Not having exercised their right to declare a forfeiture of the lease, they waived it, and cannot now rely upon it.

> Steven v. Potlatch Oil & Refining Co.,
> 80 Mont. 239, 260 Pac. 119.

Petitioners err in disregarding the rule that the oil and gas lease herein must be read as a whole, and every part of it be given effect.

> Sunburst Oil & Refining Co. v. Callender,
> 84 Mont. 178, 274 Pac. 834.

Upon these principles, it is clear that the decision of the Circuit Court of Appeals in this case was correct.

## IV.

## PETITIONERS' CONTENTION THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT OF MONTANA, IS NOT TENABLE.

On page 9 of the petition of petitioners, five decisions of the Supreme Court of Montana, with which the petitioners claim that the decision of the Circuit Court of Appeals in the case at bar is in conflict, are cited as a reason for the allowance of the writ.

An analysis of those cases indicates that with none of them does the decision of the Circuit Court of Appeals conflict.

Hereinbefore we have discussed the application of the rules in Berthelote v. Loy Oil Company, 95 Mont. 434, 28 Pac. (2d) 187, and Severson v. Barstow, 103 Mont. 526, 63 Pac. (2d) 1022, which expressly hold that there is no breach of an implied covenant to market oil or gas where the operator exercises such diligence, care and skill as a reasonably prudent operator would exercise under similar circumstances.

It is unnecessary to repeat what we have said in our discussion of those two cases. It clearly appears therefrom that the decision of the Circuit Court of Appeals is thoroughly in harmony with the rules announced in those cases.

In McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. 582, the Supreme Court of Montana held that where an "unless lease" provided for the commencement of the drilling of a well on or before a certain date, the lease would terminate unless rentals to defer drilling

were paid. The lease terminated for breach of the express covenant where a well was not commenced and rentals were not paid.

That question is not involved in any way in the case at bar. There is nothing in the decision of the Circuit Court of Appeals which conflicts or could conflict with the decision of the Supreme Court of Montana.

In the case of McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 Mont. 332, 247 Pac. 166, the same rule was announced by the Montana Supreme Court. No well was drilled and no rentals were paid. The Montana Court held, as was proper and correct, that the lease automatically terminated because of the breach of the express covenant.

The question of the termination of the lease under those conditions is not involved herein. No conflict exists between the decision of the Circuit Court of Appeals in the case at bar and that decision.

In Story Gold Dredging Co. v. Wilson, 99 Mont. 347, 42 Pac. (2d) 1003, nothing therein applies to the case at bar except that the Court held that contracts as made must be enforced by the courts. That principle applies to both parties to a contract.

Nothing in the decision of the Circuit Court of Appeals in the case at bar is in conflict with that decision.

The question before the Circuit Court of Appeals in the case at bar was whether the rules in the Berthelote and Severson cases would apply to the case at bar, and the Circuit Court of Appeals decided that those rules did apply.

It is obvious that petitioners have not distinguished in their argument between the rules applicable to breach of express covenants in an oil and gas lease and rules ap-

plicable to alleged breach of an implied covenant to market oil when there was no market or no storage facilities available.

The Circuit Court of Appeals recognized the distinction made by the Supreme Court of Montana and followed it.

We find nothing in the decisions of this Court in the cases cited on page 9, under B, of the petition, which requires any comment.

In connection with Continental Oil Company v. Osage Oil & Refining Co., 69 Fed. (2d) 19, petitioners argue, under paragraph H of their brief, p. 34-36, that the question involved herein as to the shutting in of wells because of lack of market or storage facilities for the oil is of great importance, and contend that the Continental Oil Company case is in conflict with the decision of the Circuit Court of Appeals in the case at bar.

The Continental Oil Company case was decided by the Tenth Circuit Court of Appeals on February 3, 1934.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, was decided April 25, 1938.

As we have elsewhere pointed out in this brief, the last cited case, in conjunction with Ruhlin v. New York Life Insurance Company, 304 U. S. 202, 82 L. Ed. 1290, decided May 2, 1938, eliminates the rule of "conflict of circuits."

If the decision of the Circuit Court of Appeals in the case at bar did conflict with the decision in the Continental Oil Company case, that would not be a ground for this Court to review the decision of the Circuit Court of Appeals in this case.

However, an examination of the Continental Oil Company case reveals that no oil or gas was being produced

from the lease at the end of the five-year term of the lease. The lease was dated August 27, 1918. A well was brought into production, from which, up to and including April, 1922, a small quantity of oil was produced. The production ceased and the lessee apparetly abandoned the premises. No further interest was shown by the lessee and, on February 26, 1930, more than eight years after production ceased, the Department of the Interior held that the lease had terminated.

The ground of termination was abandonment by the lessee, which was evidenced by the fact that no work had been done on the lease since April, 1922, that the pipes had rusted out, and that grass had grown up through the derrick.

The ground of the decision of the Circuit Court of Appeals was that the lease had been abandoned.

The Circuit Court of Appeals in the case at bar found that there was no abandonment of the land or wells by respondents in this case. It further found that what respondents did was for the mutual interest of both parties.

Clearly, the Continental Oil Company case decides no question which is in conflict with the law of Montana applicable to this case.

As to what is said in subdivision H of petitioners' brief, pp. 34-36, and elsewhere in the brief, as to the question here being of great importance, it is sufficient to say that it is of no more importance than any other question of the law of oil and gas heretofore decided by the Supreme Court of Montana.

It would have been a simple matter for the petitioners to have filed their case in the state courts if they desired

to learn what the Supreme Court of Montana would hold concerning the temporary shutting in of wells for lack of market and storage facilities.

It is obvious that, on principle, the Supreme Court of Montana has already decided, but not directly, the contention of petitioners adversely to them.

Petitioners' argument based upon the facts recited in subdivision H of their brief is answered by this Court in Alabama Power Company v. Ickes, 302 U. S. 464, 82 L. Ed. 374, wherein it says:

> "These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable. Davis v. Schwartz, 155 U. S. 631, 636, 637, 39 L. Ed. 289, 291, 15 S. Ct. 237; Adamson v. Gilliland, 242 U. S. 350, 353, 61 L. Ed. 356, 357, 37 S. Ct. 169."

We urge that upon the petition and brief of petitioners, a showing has not been made to warrant the issuance of the writ of certiorari to review the decision of the Circuit Court of Appeals in this case, and the petition should be denied.

Respectfully submitted,

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(27)

No. 884.

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# In the Supreme Court of the United States

October Term, 1942.

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JANE M. STIMSON and BLANCHE M NEWMAN,
Petitioners,

vs.

R. C. TARRANT and BARNES, BUTLER OIL COMPANY, a corporation,
Respondents.

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## PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF.

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Filed May ....., 1943.

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# Subject Index


| | Pages |
|---|---|
| PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF | 1-20 |
| Argument | 1 |
| Summary | 1 |
| I. | 2-5 |
| A. Statements in Respondents' brief that petitioners contended in the trial court and in the Circuit Court of Appeals that the lease terminated because respondents breached an implied covenant to market oil are not sustained by the record | 2-3 |
| B. Respondents' statement that petitioners submitted this case to the Circuit Court of Appeals upon the theory that the Supreme Court of Montana had not passed directly upon the point involved is not sustained by the Record | 3-5 |
| II. Reply to Respondents' assertion in Part II of their Brief that petitioners state no valid grounds for the issuance of Write of Certiorari | 6-9 |
| III. Petitioners were not required to give notice of intention to declare the lease forfeited for failure to produce oil | 9-10 |
| IV. No question of implied covenant to market oil is involved in the automatic termination of a lease, pursuant to the thereafter clause, by reason of cessation of production of oil | 10-11 |
| V. No question of waiver of any right by the lessors is involved in this case | 12-13 |
| VI. Reply to Respondents' argument as to dictum (Resps.' Br., pp. 19 & 20) | 13-14 |

Pages

VII. Reply to Respondents' argument concerning the construction of an oil and gas lease (Resps.' Br. pp. 21 & 22) ..... 14-15

VIII. The decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of Montana (Part II of Respondents' Brief) ..... 16

IX. Reply to Respondents' statement of "Facts Supplemental to those stated in petition and brief of Petitioners." (Resps.' Br., Part I, pp. 1-10) ..... 17-20

## Table of Authorities Cited


| | Pages |
|---|---|
| *Alabama Power Co. v. Ickes*, 302 U. S. 464 | 16 |
| *Berthelote v. Loy Oil Co.*, 95 Mont. 434 | 5, 11 |
| *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801 | 11 |
| *Continental Oil Co. v. Osage Oil & Ref. Co.*, 69 Fed. (2d) 19 | 6, 7, 16 |
| *Empire Theatre Co. v. Cloke, et al.*, 53 Mont. 183, 163 Pac. 107 | 13 |
| *Hinerman v. Baldwin*, 67 Mont. 417, 215 Pac. 1103 | 14 |
| *Johnson v. Metropolitan Life Ins. Co.*, 107 Mont. 133, 83 Pac. (2d) 922 | 14 |
| *MacGregor v. State Mutual Life Assur. Co.*, 315 U. S. 280 | 6 |
| *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582 | 15 |
| *McNamer Realty Co. v. Sunburst etc. Co.*, 76 Mont. 332, 247 Pac. 166 | 3 |
| *Mettler v. Ames Realty Co.*, 61 Mont. 152, 201 Pac. 702 | 14 |
| *Nadeau v. Texas Company*, 104 Mont. 558, 69 Pac. (2d) 586 | 12 |
| *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202 | 7 |
| *Sauder v. Mid-Continent Petroleum Corp.*, 292 U. S. 272 | 11 |
| *Severson v. Barstow*, 103 Mont. 526 | 11 |


### Statutes


| | |
|---|---|
| Section 6850, Revised Codes of Montana, 1935 | 15 |

# In the Supreme Court of the United States

October Term, 1942.

No. 884.

JANE M. STIMSON and BLANCHE M NEWMAN,
Petitioners,

vs.

R. C. TARRANT and BARNES, BUTLER OIL COMPANY, a corporation,
Respondents.

**PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF.**

**ARGUMENT**

**SUMMARY**

Argument herein will consist of petitioners' reply, first to respondents' statement that petitioners' contention in the District Court and the Circuit Court of Appeals was that the lease terminated because respondents breached an implied covenant in the lease to market the oil, and, second, to respondents' statement that petitioners submitted the case to the Circuit Court of Appeals on the theory that the Montana Supreme Court had not passed directly upon the point involved. This will be followed by replies to other contentions in respondents' brief.

(Note): References to the record are designated "R", and all emphasis by underscoring are by the authors of this Brief.

## I.

### A.

### STATEMENTS IN RESPONDENTS' BRIEF THAT PETITIONERS CONTENDED IN THE TRIAL COURT AND IN THE CIRCUIT COURT OF APPEALS THAT THE LEASE TERMINATED BECAUSE RESPONDENTS BREACHED AN IMPLIED COVENANT TO MARKET OIL ARE NOT SUSTAINED BY THE RECORD.

Respondents state that petitioners contended in the trial court and the Circuit Court of Appeals that the lease was terminated because respondents breached an implied covenant to market oil. They say:

> "Ignoring this expressed covenant, petitioners now assert that because the wells were shut in for lack of market or storage facilities, from the latter part of January, 1938, to about March 1, 1939, the lease automatically terminated as of January 1, 1938.
>
> This assertion was first made when the suit was filed, on February 6, 1940," (Resps'. Br. 14 & 15), and
>
> "The contention of petitioners is that respondents breached an implied covenant in the lease to market the oil." (Resps.' Br. 15).

See also: Statements on pp. 20, 26 & 27 of Respondents' Brief.

No reference to the record is made in support of those statements and petitioners respectfully assert that they are not borne out by the record.

Petitioners have never made any claim that the lease was either "terminated" or "forfeited" by reason of respondents' failure to market oil. Their

contention has always been, as in this Court, that cessation of production automatically terminated the lease pursuant to the "thereafter" clause. They have always contended that the matters set forth in paragraph XII of the amended answer (R. 27-38), including alleged lack of market and facilities for storing oil, were matters of affirmative defense which could not be availed of in an action of this kind. All of the evidence in support of those allegations went in over petitioners' objection that it was immaterial and did not pertain to any issue involved in this case (R. 117, 118, 124, 127, 130, 132, 167, 168, 170, 175, 177, 178, 179, 182 & 183).

Petitioners' theory is aptly described by the Supreme Court of Montana in *McNamer Realty Co. v. Sunburst etc. Co.*, 76 Mont. 332, 247 Pac. 166, as follows:

> "The court was asked, not to declare a forfeiture, but 'to ascertain whether a completed forfeiture existed, and, if so, to remove the cloud.' (*Merk v. Bowery Mining Co.*, 31 Mont. 298, 78 Pac. 519). Under the facts and circumstances shown, as heretofore discussed, the equitable rules as to relief from a forfeiture cannot be applied." (76 Mont. @ 350-351).

**B.**

**RESPONDENTS' STATEMENT THAT PETITIONERS SUBMITTED THIS CASE TO THE CIRCUIT COURT OF APPEALS UPON THE THEORY THAT THE SUPREME COURT OF MONTANA HAD NOT PASSED DIRECTLY UPON THE POINT INVOLVED IS NOT SUSTAINED BY THE RECORD.**

At page 9 of their brief respondents say that petitioners,

> "took the position that there was not any decision of the Supreme Court of Montana directly in point"

and

> "submitted the case to the Circuit Court of Appeals on the theory that the Montana Supreme Court had not passed directly upon the point."

To support those statements, they quote from page 26 of petitioners' original brief in the Circuit Court of Appeals. Briefs are not a part of the record in this Court and we understand the rule to be that the presentation of a matter to this Court must be based entirely upon the record.

Petitioners do not know the purpose of the statements referred to. However, they do know that this Court will not consider questions raised for the first time here and which were not presented to the courts below and that, under that rule, the effect of the statements referred to, if unexplained, might result in this Court's denial of the Petition for Writ of Certiorari, without further consideration.

Petitioners were able to meet respondents' statement referred to in sub-title "A" above by reference to the record, but know of no way to meet the statements last referred to, other than from the source, outside the record, to which respondents resorted, to-wit: the briefs, and, under the circumstances, feel fully justified in so doing.

The statement from petitioners' original brief, quoted and relied upon by respondents, was fully

explained at pages 12 and 13 of petitioners' reply brief in the Circuit Court of Appeals as follows:

> "At Page 26 of their brief Appellees say:
>
> 'Appellants contend that there is no decision of the Supreme Court of Montana to the effect that failure to pump oil from a lease results in the termination of the lease.'
>
> As disclosed by our original brief (pp. 26-30) and this brief, our contention is absolutely the contrary. Perhaps, our statement (Br. 26) prefacing our quotations from *Berthelote v. Loy Oil Co.* (Br. 26-29) and *Griffith v. Cedar Creek Oil & Gas Co.* (Br. 29-30) was not clear. What we attempted to say and what we mean is that, while there is no Montana case wherein an oil and gas lease has been held to be terminated by non-production of oil as distinguished from gas, our Supreme Court in those two cases decided that cessation of production of oil as distinguished from gas results in a termination of the lease under the habendum clause, regardless of lack of market or due diligence on the part of the lessee."

At page 34 of their original brief in the Circuit Court of Appeals petitioners, referring to the *Severson* case, said:

> "The district court overlooked the fact that, under *Erie R. Co. v. Tompkins*, this rule is controlling in this case. In the opinion it said: 'The argument that a different rule should be observed where oil is the product involved is not convincing under the authorities examined.' (Tr. 67).
>
> The above quotation from the *Severson* case is more than argument. It is the rule announced by the Supreme Court of Montana."

## II.

### REPLY TO RESPONDENTS' ASSERTION IN PART II OF THEIR BRIEF THAT PETITIONERS STATE NO VALID GROUNDS FOR THE ISSUANCE OF WRIT OF CERTIORARI.

For answer to petitioners' contention that the decision of the Circuit Court of Appeals in this case is in conflict with the decisions of the Supreme Court of Montana, respondents cite and rely on *MacGregor v. State Mutual Life Assur. Co.*, 315 U. S. 280. (Resps.' Br. p. 11). In that case this Court held that an interpretation of a Michigan statute by the Federal Court would not be disturbed because there was no decision of the Supreme Court of Michigan construing the statute in question. In the case at bar the decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of Montana, which are specifically pointed out in petitioners original brief.

Respondents further contend that the fact that the decision of the Circuit Court of Appeals in this case is in conflict with that of the Circuit Court of Appeals for the Tenth Circuit in *Continental Oil Co. v. Osage Oil & Ref. Co.*, 69 Fed .(2d) 19, is not a reason for granting the petition for writ of certiorari herein. They say that if each circuit is to apply the law of the state whence a case is lodged, there must, necessarily, be a conflict between decisions of Circuit Courts of Appeal. Petitioners' view of this is that where the law of two states, for instance Montana and Oklahoma, is the same upon a given question, the decisions of the Circuit Courts of Ap-

peal from the two circuits in which those states are situated should be in accord.

As pointed out in petitioners' original brief (pp. 19 & 20), the Supreme Court of Montana, in stating in the *Severson* case that "a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided", adopted and followed the law of Oklahoma. *Continental Oil Co. v. Osage Oil & Ref. Co.* came up from the United States District Court for the Northern District of Oklahoma.

In paragraph 5 of Rule 38 of this Court the statement is made that the ground for granting certiorari there set forth do not fully measure the court's discretion, and we respectfully submit that the second reason upon which we rely herein is a substantial and additional reason warranting the granting of the Petition for Writ of Certiorari in this case.

*Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, cited at pages 12 & 13 of respondents' brief, does not support respondents' contention that a conflict between decisions of Circuit Courts of Appeal is not a reason for granting certiorari. What this Court said in that case is that:

> "As to questions controlled by state courts, conflict among circuits is not of itself, a reason for granting a writ of certiorari". (304 U. S. at 206).

No attempt was made by the petitioner in that case to show that the decision of the Circuit Court of Appeals was also in conflict with the law of Pennsylvania.

Respondents say:

> "The question is of no more importance than any other question which arises out of the application of the law of oil and gas to the facts in any case involving such law." (Resps. Br. 13).

In its decision in this case, the Circuit Court of Appeals said:

> "And the storage of the oil underground was as effective as its storage in surface tanks, and obviously more economical." (R. 479).

The "thereafter" clause of the lease involved in this case reads:

> "It is agreed that this lease shall remain in force for a term of five years from this date and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee." (R. 6).

And the lease further provides:

> "In consideration of the premises the said lessee covenants and agrees:
> First. To deliver to the credit of lessor free of cost, in the pipe line to which lessee may connect his wells, the equal one-eighth (1/8) part of all oil and gas produced and saved from said leased premises." (R. 7).

The lease in the case at bar was on a printed form known as "Producers 88" (R. 6) and, as indicated by a letter from the President of respondent Barnes, Butler Oil Company to petitioner Jane M. Stimson, dated September 26, 1937, is the form of oil and gas lease generally used in Montana. (R. 434).

As construed by the Circuit Court of Appeals, a lessee, under this form of lease, may cease production of oil from the leased premises and fail to deliver any oil "to the credit of the lessor".

The obvious purpose of entering into an oil lease such as is involved in this case is that, in the event oil is discovered by the lessee, the lessor shall receive continuously one-eighth of all the oil which can be produced from the premises.

In making the statement "the storage of the oil underground was as effective as its storage in surface tanks," the Circuit Court of Appeals, in effect, decided that the lessee is performing the important covenant above quoted and, if this decision is allowed to stand, it will vitiate the most vital provision of practically every oil lease in the State of Montana.

Just what does the statement of the Circuit Court of Appeals that "the storage of the oil underground was as effective as its storage in surface tanks," mean? Petitioners submit that it can only mean that leaving the oil undisturbed in the ground is the same thing as producing the oil and, in effect, nullifies not only the clear language of the lease but the decisions of the Supreme Court of Montana cited by the petitioners.

Certainly the question involved in this case is of more importance than those usually presented in cases involving the law of oil and gas leases.

## III.

### PETITIONERS WERE NOT REQUIRED TO GIVE NOTICE OF INTENTION TO DECLARE THE LEASE FORFEITED FOR FAILURE TO PRODUCE OIL.

Respondents contend that the provision of the lease quoted on page 5 of their brief, which is commonly known as the "forfeiture clause", required petitioners to give notice of intention to declare the lease forfeited. (Resps. Br. pp. 14, 21 & 24).

This contention and the authorities cited in support thereof in Part III (pp. 14-24) of their brief disclose that respondents ignore the distinction between a "forfeiture" and "termination ipso facto" pursuant to the "thereafter" clause, and is, therefore, not applicable to the question presented here. (See pages 29 to 31 of petitioners' original brief.)

## IV.

### NO QUESTION OF IMPLIED COVENANT TO MARKET OIL IS INVOLVED IN THE AUTOMATIC TERMINATION OF A LEASE, PURSUANT TO THE THEREAFTER CLAUSE, BY REASON OF CESSATION OF PRODUCTION OF OIL.

Respondents contend that the cessation of production of oil did not terminate the lease for the reason that there was an implied covenant to market oil, and that, in the absence of a market, due diligence on their part excused compliance with this implied covenant. (Resps. Br. pp. 9, 10, 15 & 20).

While such a contention may be involved in a question of "forfeiture", it is not involved in this case, as is pointed out by the authorities and argument at pages 29 to 31 of petitioners' original brief. We ask the Court to keep in mind the fact that the lease herein contains no agreement or promise on the part of the lessees to continue production and

that, by reason of the provisions of the "thereafter" clause, it was optional with respondents to cease production at any time and allow the lease to terminate just as they did in this case.

In support of this contention and their contention that notice was required, respondents cite and quote from *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801. (Resps. Br. pp. 16 & 17). That case involved a forfeiture and not automatic termination under a "thereafter" clause. Also, it involved gas and not oil, and the lessors had declared the lease forfeited for failure of the lessees to pay an annual rent of $50.00 for wells on the property from which gas was used off the premises. No question as to the delivery of a part or percentage of the product to the credit of the lessor was involved. It is true that the *Brewster* case is cited in the *Berthelote* case (95 Mont. @ 446), and in the *Severson* case (103 Mont. @ 535) but in neither of those cases is it cited upon the question involved here.

Respondents also cite *Sauder v. Mid-Continent Petroleum Corp.*, 292 U. S. 272. (Resps.' Br. 16). That case can have no application here for, as there said by this Court:

> "The question for decision is whether the respondent failed to comply with an implied covenant to develop the tract with reasonable diligence."

The development referred to was the drilling of wells. (292 U. S. @ 276 to 277).

## V.

### NO QUESTION OF WAIVER OF ANY RIGHT BY THE LESSORS IS INVOLVED IN THIS CASE.

Respondents claim that petitioners waived their right to declare a "forfeiture" by failing to give notice. No question of "forfeiture" is involved in this case. (See Petitioners' Orig. Br., pp. 29 to 31).

Respondents also claim that petitioners waived their right to declare a "forfeiture" upon another ground, to-wit: upon the ground that petitioners had accepted royalties after production ceased. This claim is not sustained by the record. At the top of page 15 of their brief, they make the statement that after the wells on petitioners' land were reopened, respondent Tarrant paid the landowners' royalties to the administrator of the estate of petitioners' ancestor and that the administrator was in possession of the royalties at the time of the trial of the suit, and, at page 22 of their brief, cite *Nadeau v. Texas Co.*, 104 Mont. 558, 69 Pac. (2d) 586, wherein the court said:

> "A lessor in an 'unless' lease waives his power to declare a forfeiture for failure to drill or pay rentals within the time designated by the lease, by the acceptance of delay rentals after the breach has occurred." (104 Mont. at 564).

This is a further indication that respondents have confused "forfeiture" with automatic "termination" of a lease under the "thereafter" clause. The following portions of the Record disclose that respond-

ent Tarrant has never paid the landowners' royalties for oil produced after the wells were re-opened.

On November 2, 1940, approximately nine months after this suit was commenced, respondent Tarrant turned eighteen checks over to his Office Manager, Mr. Henry, who was the Administrator of the Estate of Alice Long Miller (R. 294). These checks were payable to the petitioners and their brother, Robert L. Morrow (R. 251 & 252). Petitioners were never notified that the checks had been issued or turned over to Mr. Henry (R. 299). Mr. Henry had no authority to endorse them. He testified that they were made out to keep Mr. Tarrant's royalty record straight and that they would be retired and either money or new checks substituted for them when the Miller Estate was ready for distribution (R. 303). Under the circumstances, those checks were but scraps of paper and certainly did not constitute payment.

## VI.

### REPLY TO RESPONDENTS' ARGUMENT AS TO DICTUM. (RESPONDENTS' BRIEF PP. 19 & 20).

For answer to petitioners' contention that the language of the Supreme Court of Montana in the *Severson* case that:

> "a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided"

is not dictum, respondents cite *Empire Theatre Co. v. Cloke*, 53 Mont. 183, 163 Pac. 107, and *Mettler v.*

*Ames Really Co.*, 61 Mont. 152, 201 Pac. 702 (Resps. Br. 19 & 20).

In the *Empire Theatre Co.* case the Montana court decided that the language which was claimed to be dicture was not dictum (see 53 Mont. at 190 & 191).

Petitioners submit that respondents have not explained away the definitions of dictum in the cases cited and discussed at pages 23-26 of petitioners' original brief.

## VII.

### REPLY TO RESPONDENTS' ARGUMENT CONCERNING THE CONSTRUCTION OF AN OIL AND GAS LEASE. (RESPONDENTS' BRIEF 21 & 22).

In support of their argument as to how they claim the lease should be construed, respondents first cite and quote from *Hinerman v. Baldwin*, 67 Mont. 417, 215 Pac. 1103. Petitioners have no quarrel with the rules of construction there announced.

Respondents also say that a "lease must be read as a whole and, if possible, every part be given effect". (Resps. Br. 22). This is true, subject to the qualifications pointed out by the Supreme Court of Montana in *Johnson v. Metropolitan Life Ins. Co.*, 107 Mont. 133, 83 Pac. (2d) 922, as follows:

> "if there is no ambiguity, and the provisions of the contract of insurance are plain and clear and lend themselves to but one construction, it is the duty of the court to give to the contract that one plain and clear construction, and not to attempt to re-write for the parties a contract differing from the one to which the parties

> agreed. In this latter respect a contract of insurance does not differ in its construction from any other contract. It is incumbent on this court to examine the four corners of this contract to determine whether such ambiguity exists (*Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67; *Kurth v. National Life & Acc. Ins. Co.*, (Tex. Civ. App.), 79 S. W. (2d) 338), and if it does not, then this court is powerless to make a contract for the parties contrary to the one expressed in the agreement." (107 Mont. @144).

The "thereafter" clause of the lease in the case at bar is clear and free from ambiguity.

In the lease in this case the "forfeiture" clause follows the "habendum" clause and, in *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582, cited at page 22 of respondents' brief, the Montana Court said:

> "Furthermore, the forfeiture clause follows the habendum clause, the 'unless' clause and other essential parts of the lease. And Section 6853, Revised Codes of 1921 provides that if several parts of a grant are absolutely irreconcilable the former part prevails." (75 Mont. @ 368).

We also call attention to Section 6850 of the Revised Codes of Montana of 1935, which reads:

> "Limitations—How Controlled. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct."

See also Parts B and D of petitioners original brief (pp. 18-23 & 26-29).

## VIII.

### THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF MONTANA (PART II OF RESPONDENTS' BRIEF).

The contention of respondents contained in this part of their brief (pp. 25-29) is so completely answered by petitioners' original brief as to require no reply, except to point out that the lease involved in the case of *Continental Oil Co. v. Osage Oil & Refining Co.*, 69 Fed. (2d) 19, was declared terminated by reason of cessation of production and not by "abandonment" by the lessee, as stated at page 28 of respondents' brief. The court said:

> "A finding by the Secretary of the Interior that the Osage Company was not producing oil and gas from the lease on August 27, 1923, and that the lease terminated on that date would be binding on the courts in the absence of a showing that the Secretary's action was arbitrary or fraudulent." (69 Fed. (2d) @ 27).

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At page 29 of their brief, respondents cite *Alabama Power Co. v. Ickes*, 302 U. S. 464, in reply to Part H of petitioners' original brief. This makes it clear that they failed to understand that the undisputed facts referred to on pages 34 and 35 of petitioners' original brief were not mentioned in connection with the findings of fact but solely for the purpose of illustrating the importance of the questions involved.

## IX.

### REPLY TO RESPONDENTS' STATEMENT OF "FACTS SUPPLEMENTAL TO THOSE STATED IN PETITION AND BRIEF OF PETITIONERS." (RESPONDENTS' BRIEF, PART I, PP. 1-10).

Petitioners want to be sure that it is "crystal clear" that they do not ask this Court to review the evidence and that they contend that the question of law presented, to-wit: "Did the lease terminate upon cessation of production of oil pursuant to the provisions of the 'thereafter' clause?" depends entirely upon undisputed facts. Every fact referred to in petitioners' "SUMMARY STATEMENT OF THE MATTER INVOLVED" in the petition (pp. 1 to 5) is of that character.

That question of law depends solely upon the language of the lease and the admitted fact that production of oil from petitioners' land ceased in January, 1938. Overlooking this, ~~petitioners~~ respondents, in part I of their brief, refer to certain matters which are dependent upon evidence introduced in support of the allegations of paragraph XII of the amended answer and in rebuttal thereto. As hereinbefore pointed out, petitioners contend that matters of affirmative defense are not involved in an action of this kind (this brief, p. 3). However, since respondents have referred to such matters of evidence, petitioners believe it proper to clarify and direct the Court's attention to contradictory evidence and the fact that such evidence clearly illustrates the effect of the decision of the Circuit Court of Appeals herein.

At page 7 of their brief, respondents say that Tarrant kept the petitioners informed as to the situation with respect to a lack of market or storage facilities and refer to 12 parts of the Record. These references are to letters which respondent Tarrant wrote to petitioners and their brother between November 15, 1937 and March 4, 1939.

Instead of informing them as to the situation with respect to market, he told them that he had no market when, in fact, he was marketing oil from other leases which he owned or operated in the immediate vicinity of their land, during the entire period of non-production from their land. (Rr. 105, 355 & 357).

In his letter of December 13, 1937 (R. 191) he said:

> "I am making a long term contract on part of my production whereby they are supposed to start taking the oil in March."

He did not tell them that 6 days prior to that time he had made a contract with the Yale Oil Corporation (R. 147-159) for the sale of 550 barrels of oil a day from lands which he designated therein. Neither did he tell them that he had not included the North Half of their land, from which oil could be produced and in which he had retained less than 30% of the oil, (R. 190) nor that he had included the South Half of their tract, in which no oil had been found but in which he still retained 65% of the oil. (R. 190).

In his letter of March 4, 1939, (R. 426) he told petitioners that he had had 25 wells shut down for 14

months, and the fact was that he had had only 14 wells shut down and had been producing from 27 other wells. (R. 357).

On page 6 of their brief, respondents point out how much Mr. Tarrant spent in drilling wells and in operating the lease and refer to a statement which he introduced over petitioners' objection at the trial. (Rr. 179). This statement indicates that he had suffered a loss. By his sub-lease (R. 12-14) he was entitled to 80% of the oil produced from petitioners' land but he elected to and had sold 15 of his 80% from the South Half of the tract and 53 of his 80% from the North Half, (R. 190) at an average price of $1000 per 1%, or a total of $68,000. This is not disclosed in the statement at page 179 of the Record. Had he not sold these royalties, he would have retained 80% of the $203,000 realized from the sale of oil from petitioners' land, or approximately $162,000.

On page 7 of their brief, respondents point out that Mr. Tarrant was not in privity with the petitioners, but respondent Barnes, Butler Oil Company was. The President of that Company wrote petitioner Stimson, on September 26, 1937, that the sub-lease to respondent Tarrant "embodies all of form 'Producers 88' Montana" (R. 434). A comparison of the lease and the sub-lease discloses that there is no similarity. Respondent Tarrant testified as to what the Barnes, Butler Oil Company did. He said:

> "Q. Well so far as the operation of the lease is concerned, has the Barnes, Butler Oil Com-

pany participated in it at all, except to get its royalties?

A. Not at all." (R. 131).

Petitioners had a right to rely on their lessee, Barnes, Butler Oil Company, to see that the lease was operated fairly. Petitioners lived on the Pacific Coast (R. 1) and did not learn that Mr. Tarrant had been marketing oil from other lands during the period of non-production from their land, nor that he had resumed production from their land in March, 1939, until September 13, 1939. (R. 436-439).

We believe that this Court will, with this understanding of the Record, agree that the evidence referred to by respondents in Part I of their brief clearly illustrates how the rights of any lessor may be trifled with if the decision in this case is allowed to stand.

Having fully replied to all new matters referred to in respondents' brief, petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

Dated, Helena, Montana, May 2, 1943.

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